Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

FEDERAL INSURANCE COMPANY,

Petitioner,

v.

KENNETH R. JONES, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

[Filed March 26, 2002]
[Leonard Green, Clerk]

No. 01-4323

UNITED STATES COURT OF APPEALS
FOR THE SIXTH DISTRICT

KENNETH R. JONES; MARY B. JONES,

Plaintiffs-Appellees,

v.

FEDERAL INSURANCE COMPANY;

Defendant-Appellant,

AMERICAN MOTORISTS INSURANCE COMPANY;
ENERGY INSURANCE (BERMUDA), LTD.,

Defendants.

[NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION
Sixth Circuit Rule 28(g) limits citation
to specific situations. Please see
Rule 28(g) before citing in a
proceeding in a court in the Sixth
Circuit. If cited, a copy must be served
on other parties and the Court.
This notice is to be prominently
displayed if this decision is reproduced]

Before: NORRIS, BATCHELDER, and CLAY, Circuit Judges.

ORDER

Kenneth Jones was injured in a collision with an automobile while he was riding his motorcycle. He and his wife sued the insurers of their employers in an Ohio court. To the extent their injuries were not compensated by other sources, the plaintiffs sought underinsured motorist coverage under the terms of policies issued to their employers. The authority for such an action arguably flows from *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*, 85 Ohio St.3d 660 (1999). That case held that in the absence of a specific clause to the contrary, an employee could recover under the uninsured/underinsured motorist coverage of his employer's insurance policy regardless of whether he was acting within the scope of employment at the time of injury.

One of the defendants to the suit, Federal Insurance Company, filed a notice of removal to federal district court on grounds of diversity jurisdiction. After removal, the district court issued an order noting that it appeared Federal must be deemed a citizen of Ohio pursuant to 28 U.S.C. § 1332(c)(1). The court directed the defendant to show cause why the case should not be remanded to the state court for lack of jurisdiction.

Upon consideration, the district court concluded that complete diversity was lacking. Section 1332(c)(1) provides in part that "in any direct action against the insurer of a policy or contract of liability insurance . . . to which the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen." The district court relied upon its reasoning in an opinion issued in *Kormanik v. St. Paul Fire and Marine Ins. Co.*, No. 01 CV2122 (N.D. Ohio, Oct. 19, 2001), in which it had held that actions

brought pursuant to the *Scott-Pontzer* authority are direct actions within the meaning of § 1332(c)(1). Applying § 1332(c)(1) to the instant action, the district court concluded that one of the defendant's insureds was a citizen of Ohio and that therefore diversity was lacking.

The defendant appealed the district court's decision. Now the plaintiffs move to dismiss this appeal on grounds that the order is not reviewable. The defendant responds in opposition to the motion, and the plaintiffs reply in support.

Review of an order remanding a case to the state court from which it was removed is generally barred by 28 U.S.C. § 1447(d), which provides in part that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . . " This statute does not bar review of all remand orders. Rather, "only remands based on grounds specified in [28 U.S.C.] § 1447(c) are immune from review under § 1447(d)." *Quackenbush v. Allstate Ins. Co.*., 517 U.S. 706, 711-12 (1996) (citations omitted). Those grounds include a lack of subject matter jurisdiction.

Although the district court clearly found an absence of diversity jurisdiction in the instant case, the defendant argues that the district court's decision was something other than a determination of jurisdiction. The conclusion that this case constitutes a direct action under § 1332(c)(1), argues the defendant, is a reviewable nonjurisdictional determination. The defendant suggests that a policy decision has been made similar to that in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). In *Thermtron*, a basis for federal jurisdiction over the removed action had been shown, but the district court nonetheless remanded the case out of concern for an overburdened docket. Because the remand was not based on one of the grounds of § 1447(c), the Court held that it was

reviewable. The defendant suggests that a similar policy determination has been made in the instant case because the district court has concluded that a *Scott-Pontzer* action does not belong in federal court. However, unlike *Thermtron*, the district court has applied a jurisdictional statute to the facts presented. The legal holding with which the defendant takes issue was in the context of the larger jurisdictional determination.

This court has recognized that a remand order may be reviewed if it is "based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction." *Anusbigian v. Trugreen/Chemlawn, Inc.*, 72 F.3d 1253, 1256 (6th Cir. 1996), *citing Regis Associates v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 194-95 (6th Cir. 1990). But when the issue sought to be appealed is subsumed into the jurisdictional decision, it is not independently appealable. *Anusbigian*, 72 F.3d at 1256 (if district court determines that it lacks subject matter jurisdiction over a removed case and for that reason remands it, the court of appeals lacks jurisdiction); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1343-49 (6th Cir. 1993) (where district court makes a decision that is necessary for determining whether the court has subject matter jurisdiction, the decision falls within the scope of § 1447(d)'s prohibition); *State of Ohio v. Wright*, 922 F.2d 616, 619-20 (6th Cir. 1993) (where question of removal jurisdiction was the heart of the decision, fact that district court had to examine plausibility of federal defense did not confer jurisdiction upon the court of appeals). In the instant case, the district court's holding was one of jurisdiction. Therefore, it is not reviewable.

The defendant also suggests that this court retains jurisdiction because issues of constitutional dimension are presented. It relies primarily upon *In re TMI Litigation*, 940 F.2d 832 (3d Cir. 1991), where the district court held unconstitutional a statute that conferred federal jurisdiction. We

do not believe that *TMI* compels review where, as here, the court has applied a federal jurisdictional statute and found jurisdiction wanting, nor do we believe the defendant has asserted constitutional arguments of such a magnitude that would warrant ignoring the prohibition of § 1447(d).

The motion to dismiss this appeal hereby is GRANTED.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:01CV1616

KENNETH R. JONES, et al.,

Plaintiffs,

vs.

FEDERAL INSURANCE CO., et al.

Defendants.

JUDGE: DAN AARON POLSTER

MEMORANDUM OF OPINION AND ORDER

On May 30, 2001, Plaintiffs, Kenneth R. Jones and Mary B. Jones filed a Complaint in the Stark County Court of Common Pleas against Defendants Federal Insurance Company ("Federal Insurance") and American Motorists Insurance Company. Plaintiffs' Complaint arises out of a March 27, 1999 accident which occurred when a negligent driver struck Kenneth Jones as he was riding his motorcycle. Plaintiffs allege that they are insureds under their employers' uninsured/underinsured motorist insurance policies (*see, e.g., Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*, 85 Ohio St.3d 660 (1999))and that the defendant insurers breached their contracts of insurance and acted in bad faith.

On July 2, 2001, Defendant Federal Insurance removed

the case to this Court pursuant to 28 U.S.C. § 1332 (diversity jurisdiction). (ECF No. 1). On September 18, 2001, Plaintiffs filed an Amended Complaint (ECF No. 20) which added a third insurer, Energy Insurance (Bermuda, Ltd., to the case.

On October 19, 2001, the Court issued an opinion in *Kormanik v. St. Paul Fire and Marine Ins. Co.* (Case No. 5:01CV2122), remanding a *Scott-Pontzer* case for lack of jurisdiction. On October 22, 2001, the Court issued a Show Cause Order (ECF No. 29) which attached the *Kormanik* opinion and required Federal Insurance to explain why this case should not also be remanded. On November 1, 2001, Federal Insurance filed a response (ECF No. 32) to the Court's Show Cause Order. On November 5, 2001, Plaintiffs filed a Memorandum in Opposition (ECF No. 33) to Federal Insurance's response.

Having reviewed the parties' briefs, the Court finds that this case must be remanded for the same reasons stated in the *Kormanik* opinion. Although the defendant insurers are located in New Jersey, Illinois, and the Bahamas, at least one of the insureds, American Electric Power Co., Inc., is a citizen of Ohio. Because Plaintiffs are also citizens of Ohio, diversity jurisdiction is lacking.

For the reasons stated above, the Court hereby Orders that the above-captioned case be remanded to the Stark County Court of Common Pleas.

IT IS SO ORDERED.

S/Dan Aaron Polster 11/14/01
Dan Aaron Polster
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:01CV662

PHYLLIS VERHOVEC, *et al.*,

Plaintiffs,

vs.

WAUSAU INSURANCE CO., *et al.*

Defendants.

JUDGE: DAN AARON POLSTER

ORDER OF REMAND

For the reasons stated in the Memorandum Opinion and Order filed contemporaneously with this entry of judgment, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby **ORDERED, ADJUDGED and DECREED** that the above-entitled action is remanded to the Court of Common Pleas of Tuscarawas County, Ohio, the state court from which it was removed.

A certified copy of this Order of Remand shall be mailed by the Clerk of the United States District Court for the Northern District of Ohio to the Clerk of the Tuscarawas County, Ohio, Court of Common Pleas.

IT IS SO ORDERED.

S/Dan Aaron Polster 11/14/01
Dan Aaron Polster
United States District Judge

APPENDIX D

POLSTER, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:01cv1616

KENNETH R. JONES, ET AL.,

Plaintiff(s),

v.

FEDERAL INSURANCE CO., ET AL.,

Defendant(s).

ORDER

On July 2, 2001, Defendant Federal Insurance Company removed the above-captioned case to this Court pursuant to 28 U.S.C. § 1441(a). (ECF No. 1). Defendant contends that this Court has diversity jurisdiction over the case because Plaintiffs are citizens of Ohio, Defendant is a citizen of New Jersey, and the amount in controversy exceeds $75,000. It appears to the Court that, pursuant to 28 U.S.C. § 1332(c)(1), the defendant is deemed a citizen of Ohio. Since complete diversity does not exist, the Court does not have jurisdiction over the matter. Attached is a recent memorandum of opinion and order in another case addressing the issue.

Defendant Federal Insurance Company is hereby ordered to show cause in writing, within 10 days upon receipt of this order, why this case should not be remanded for lack of

jurisdiction.

IT IS SO ORDERED.

/s/Dan Aaron Polster 10/22/01
Dan Aaron Polster
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:01CV02122

ELLA LOUISE KORMANIK, ADMIN., et al.,

Plaintiffs,

v.

ST. PAUL FIRE AND MARINE INS. CO., et al.

Defendants.

JUDGE: DAN AARON POLSTER

MEMORANDUM OF OPINION AND ORDER

Before this Court is Plaintiffs' Motion to Remand Case to Summit County Court of Common Pleas (ECF No. 11). For the reasons stated below, Plaintiffs' motion is **GRANTED.**

I. BACKGROUND

On August 3, 2001, Plaintiffs filed a wrongful death and survivorship action against Defendant St. Paul Fire and Marine Insurance Company in the Summit County Court of Common Pleas. (ECF No. 1, Ex. A). In the Complaint, Plaintiffs allege that on August 3, 1999, Amie Kormanik, who was the daughter of Ella Louise Kormanik, died as a result of an automobile accident. Because the tortfeasors involved in that action were underinsured, Plaintiffs now seek damages from Defendant, the insurer of Ella Louise Kormanik's former employer, pursuant to the Ohio Supreme Court's decision in *Scott-Pontzer v. Liberty*

Mutual Fire and Ins. Co., 85 Ohio St.3d 660 (1999).

On September 5, 2001, Defendant removed the action to this Court pursuant to 28 U.S.C. § 1441(a). (ECF No. 1). Defendant contends that this Court has diversity jurisdiction over the case because Plaintiffs are citizens of Ohio, Defendant is a citizen of Minnesota, and the amount in controversy exceeds $75,000. *Id.* at 2. On October 4, 2001, Plaintiffs filed a Motion to Remand (ECF No. 11), in which they argue that complete diversity does not exist because Defendant is a citizen of both Minnesota and Ohio.

II. LEGAL ANALYSIS

For purposes of diversity jurisdiction, a corporation is a citizen of both its state of incorporation and the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1). When a corporation is an insurer, citizenship also may be predicated upon the citizenship of the insured. According to the express terms of 28 U.S.C. § 1332(c)(1) ("the diversity-limiting provision"):

> [I]n any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

In this case, the only named defendant is St. Paul Fire and Marine Insurance Company. Defendant's insured, W.G. Lockhart Construction Company, is an Ohio corporation with its

principal place of business in Ohio. Thus, if the provision quoted above applies to this case, Defendant must be deemed a citizen of Ohio and diversity will be lacking.

Defendant argues that the provision does not apply because this case is not a "direct action" within the meaning of the statute. In support of its position, Defendant points to *Henderson v. Selective Ins. Co.*, 369 F.2d 143 (6th Cir. 1966) and *Stockton v. General Accident Ins. Co.* 897 F.2d 530, unpublished (6th Cir. 1990). In *Henderson*, the Sixth Circuit held that the diversity-limiting provision did not apply in a case brought by judgment creditors of a negligent driver against insurers for an automobile salesman and an automobile dealership that allowed the negligent driver to drive one of the dealership's vehicles. The court based its decision upon legislative history indicating that the provision had been enacted solely for the purpose of addressing ". . . a situation arising in the States of Wisconsin and Louisiana, as a result of the enactment of 'direct action' statutes in those states permitting suits directly against the insurance companies without joining the insured." *Id.* at 149.

In *Stockton v. General Accident Ins. Co.*, the Sixth Circuit held that a garnishment lawsuit brought by judgment creditors against an insurer was not a direct action for purposes of § 1332(c). 897 F.2d 530. The court found that a "direct action" for purposes of § 1332(c), is "an action that under applicable state law may be brought directly against the insurer by the tort claimant prior to entry of any judgment against the alleged tortfeasor." *Id.* at *3. Based upon this definition, the court concluded that the lawsuit before it was not a direct action because a valid judgment against the insured tortfeasors was a prerequisite to any garnishment action by the plaintiffs against the insurer. *Id.*

The Court finds that neither of the above cases requires a finding that the diversity-limiting provision does not apply in this case. In *Henderson*, the Sixth Circuit explicitly recognized that the provision was adopted in an effort to address the increasing case burden faced by federal courts as the result of state laws which created diversity where it would not have existed before. *Henderson*, 369 F.2d at 149. The Sixth Circuit's decision in *Ford Motor Co. v. Insurance Co. of North America*, 669 F.2d 421 (6th Cir. 1982), further expanded upon this view. In that case, the Sixth Circuit held that the diversity-limiting provision of § 1332(c) stripped the district court of diversity jurisdiction over an action filed by a plaintiff directly against an insurer pursuant to Michigan's no- fault insurance statute. The court noted that although it had initially given a narrow reading to the diversity-limiting provision, its application should not be limited "to the specific conditions which gave it birth." *Id.* at 425. The court concluded that the no-fault suits against insurers pursuant to the Michigan statute constituted "direct actions" within the meaning of § 1332(c) because they resulted in the same type of "back-door diversity" that the provision was intended to prevent. *Id.* at 426.

Much like the "direct action" statutes enacted by the legislatures in Wisconsin and Louisiana and Michigan's no-fault insurance statute, the *Scott-Pontzer* line of cases has resulted in a burgeoning number of cases that would not otherwise have fallen within the diversity jurisdiction of the federal courts. Thus, the same policy reasons that prompted the addition of the diversity restricting provision to § 1332(c) in the first place apply with equal force to *Scott-Pontzer* actions. Furthermore, the unsettled nature of the law surrounding such actions frequently leaves district courts in the difficult position of attempting to guess how the Ohio Supreme Court would rule given a particular set of circumstances. It makes far more sense for a state court to address these unsettled issues because then

the Ohio Supreme Court would have an opportunity to correc any errors that might be made.

The Sixth Circuit's decision in *Stockton* is no determinative because it involved an entirely different type o action. *Stockton* concerned an attempt by plaintiffs wh obtained default judgments against two tortfeasors to collect o those judgments by filing a separate lawsuit against th tortfeasors' insurer. 897 F.2d 530. This case is not a collectio or garnishment action based upon a previous judgment agains a tortfeasor. Rather, as is permitted by *Scott-Pontzer* and it progeny, it is a direct action against the insurer of a compan that was not even involved in the accident. Such actions do no require a prior entry of judgment against the tortfeasor[1] an therefore do not fall outside of the Sixth Circuit's definition o a "direct action."

III. CONCLUSION

For the reasons stated above, the Court finds that the above-captioned suit is a "direct action" against an insure within the meaning of 28 U.S.C. § 1332(c). Because Defendan is a citizen of both Minnesota and Ohio, complete diversity does not exist and the Court is without jurisdiction over the case. Accordingly, Plaintiffs' Motion to Remand Case to Summi County Court of Common Pleas (ECF No. 11) is **GRANTED**.

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[1] An allegation that the tortfeasor either has no insurance or has insurance insufficient to cover the Plaintiff's injuries will suffice.

BEST AVAILABLE COPY

IT IS SO ORDERED.

S/Dan Aaron Polster 10/19/01
Dan Aaron Polster
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:01CV02122

ELLA LOUISE KORMANIK, ADMIN., et al.,

Plaintiffs,

v.

ST. PAUL FIRE AND MARINE INS. CO., et al.

Defendants.

JUDGE: DAN AARON POLSTER

ORDER OF REMAND

For the reasons stated in the Memorandum Opinion and Order filed contemporaneously with this entry of judgment, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby **ORDERED, ADJUDGED and DECREED** that the above-entitled action is remanded to the Court of Common Pleas of Summit County, Ohio, the state court from which it was removed.

A certified copy of this Order of Remand shall be mailed by the Clerk of the United States District Court for the Northern District of Ohio to the Clerk of the Summit County, Ohio, Court of Common Pleas.

IT IS SO ORDERED.

S/Dan Aaron Polster 10/19/01
Dan Aaron Polster
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Case No. 5:01CV1616

KENNETH R. JONES
13571 Sousa St.
N. Lawrence, Ohio 44666

and

MARY B. JONES
13571 Sousa St.
N. Lawrence, Ohio 44666

Plaintiffs,

v.

FEDERAL INSURANCE CO.,
Part of the Chubb Group of Insurance Companies
15 Mountain View Road
Warren, NJ 07059

and

AMERICAN MOTORISTS INSURANCE COMPANY
1 Kemper Drive
Long Grove, IL 60049-0001

and

ENERGY INSURANCE (BERMUDA), LTD.
c/o H&H Park International Limited
Attn: Martyn Svensen
P.O. Box HM 2064
Hamilton HM HX, Bermuda

Defendants.

JUDGE: POLSTER

AMENDED COMPLAINT: BREACH OF CONTRACT; BAD FAITH

JURY DEMAND ENDORSED HEREON

Plaintiffs, Kenneth Jones and Mary Jones ("Plaintiffs"), for their Complaint against Defendants, Federal Insurance Company, Part of the Chubb Group of Insurance Companies ("Federal"), American Motorists Insurance Co. ("American"), and Energy Insurance (Bermuda), Ltd. ("Energy") state as follows:

GENERAL ALLEGATIONS

1. Plaintiffs are residents of the State of Ohio and are currently domiciled at 13571 Sousa Street, North Lawrence, Stark County, Ohio 44666.

2. Upon information and belief, Federal is an insurance company regularly doing business in Stark County, Ohio.

3. Upon information and belief, American is an insurance company regularly doing business in Stark County, Ohio.

4. Upon information and belief, Energy is an insurance company regularly doing business in Stark County, Ohio.

5. On March 27, 1999, Plaintiff Kenneth Jones was involved in an automobile collision in which another driver negligently failed to yield the right of way to Mr. Jones and struck Mr. Jones as he was operating his motorcycle.

6. As a result of the collision, Mr. Jones was forced to have his left foot, ankle and calf amputated, resulting in substantial medical bills and expenses, tremendous pain and suffering, and lost wages and lost earning capacity.

7. Plaintiff Mary Jones has been damaged through the loss of Kenneth Jones' society, companionship, and consortium.

8. Plaintiffs are insureds under Federal insurance policies 3710-62-62 ERG and/or 7320-04-14 and prior policies with respect to the aforementioned automobile collision.

9. The Federal insurance policy was issued to American Electric Power Co., Inc.

10. At all times relevant herein, Plaintiff Kenneth Jones was an employee of American Electric Power Co., Inc.

11. Plaintiffs are insureds under American insurance policy 3MG 0786199-01 and prior policies, as well as policy 3SX12433l-00, with respect to the aforementioned automobile collision.

12. The American insurance policies were issued to The M. K. Morse Co.

13. At all times relevant herein, Plaintiff Mary Jones was

an employee of The M. K. Morse Co.

FIRST CAUSE OF ACTION -BREACH OF CONTRACT UNINSURED MOTORISTS BENEFITS

14. Plaintiffs restate the allegations contained in paragraphs 1 through 13 as if fully rewritten herein.

15. All premium payments due to American on all insurance policies were timely paid, and American provided a policy which was in effect on March 27, 1999, the date of the aforementioned automobile collision.

16. Plaintiffs are insureds under American insurance policy 3MG 0786199-01 and prior policies, as well as policy 3SXI24331-00, with respect to the aforementioned automobile collision.

17. American is required to provide coverage to Plaintiffs under the Ohio Revised Code and under applicable Ohio Supreme Court Authority.

18. American's motor vehicle liability policies must either offer underinsured or uninsured motorist coverage for the protection of their insureds or such coverage arises by operation of law.

19. Counsel for Plaintiffs have demanded American to provide underinsured motorist coverage to Plaintiffs for any injuries that would not be compensable under the tortfeasor's liability insurance policy.

20. American has denied uninsured/underinsured motorists coverage for the March 27, 1999 collision, thereby materially breaching the contract of insurance Plaintiffs hold

with American.

21. As a direct and proximate result of American's breach of contract, Plaintiffs are entitled to compensatory damages in excess of Twenty-five Thousand Dollars ($25,000).

SECOND CAUSE OF ACTION -BAD FAITH

22. Plaintiffs restate the allegations contained in paragraph 1 through 21 as if fully rewritten herein.

23. Despite demand for payment, American has unreasonably and unlawfully failed and refused to provide uninsured/underinsured motorist coverage to Plaintiffs.

24. The actions of American in failing and refusing to provide coverage of any claims in this matter is in bad faith, entitling Plaintiffs to an award of compensatory and punitive damages, in excess of One Hundred Thousand Dollars ($100,000).

THIRD CAUSE OF ACTION -BREACH OF CONTRACT UNINSURED MOTORISTS BENEFITS

25. Plaintiffs restate the allegations contained in paragraphs 1 through 24 as if fully rewritten herein.

26. All premium payments due to Federal on all insurance policies, were timely paid, and Federal provided a policy which was in effect on March 27, 1999, the date of the aforementioned automobile collision.

27. Plaintiffs are insureds under Federal insurance policy 3710-62-62 ERG and prior policies with respect to the aforementioned automobile collision.

28. Federal is required to provide coverage to Plaintiffs under the Ohio Revised Code and under applicable Ohio Supreme Court Authority.

29. Federal's motor vehicle liability policies must either offer underinsured or uninsured motorist coverage for the protection of their insureds or such coverage arises by operation of law.

30. Counsel for Plaintiffs have demanded Federal to provide underinsured motorist coverage to Plaintiffs for any injuries that would not be compensable under the tortfeasor's liability insurance policy.

31. Federal has denied uninsured/underinsured motorists coverage for the March 27, 1999 collision, thereby materially breaching the contract of insurance Plaintiffs hold with Federal.

32. As a direct and proximate result of Federal's breach of contract, Plaintiffs are entitled to compensatory damages in excess of Twenty-five Thousand Dollars ($25,000).

FOURTH CAUSE OF ACTION -UNINSURED MOTORISTS BENEFITS

33. Plaintiffs restate the allegations contained in paragraph 1 through 32 as if fully rewritten herein.

34. All premium payments due to Energy on all insurance policies, were timely paid, and Energy provided a policy which was in effect on March 27, 1999, the date of the aforementioned automobile collision.

35. Plaintiffs are insureds under Energy Insurance policy

3SXl24331-00 and prior policies with respect to the aforementioned automobile collision.

36. Energy is required to provide coverage to Plaintiffs under the Ohio Revised Code and under applicable Ohio Supreme Court Authority.

37. Energy's motor vehicle liability policies must either offer underinsured or uninsured motorist coverage for the protection of their insureds or such coverage arises by operation of law.

38. Counsel for Plaintiffs have demanded Energy to provide underinsured motorist coverage to Plaintiffs for any injuries that would not be compensable under the tortfeasor's liability insurance policy.

39. Plaintiffs are entitled to uninsured/underinsured motorists coverage from Energy in an amount in excess of Twenty-five Thousand and no/100 Dollars ($25,000.00).

WHEREFORE, Plaintiffs, Kenneth R. Jones and Mary B. Jones, demand judgment against Defendants, Federal Insurance Company, Part of the Chubb Group of Insurance Companies, American Motorists Insurance Co., and Energy Insurance (Bermuda) Ltd., jointly and severally as follows:

(i) For compensatory damages in excess of Twenty-five Thousand Dollars ($25,000);

(ii) For punitive damages in excess of One Hundred Thousand Dollars ($100,000);

(iii) For their attorney's fees expended in seeking coverage under Plaintiffs' policies of insurance

with Federal and American;

(iv) For their costs incurred herein; and

(v) For such other and further relief as this Court deems just and equitable.

Respectfully submitted,
BLACK, MCCUSKEY, SOUERS & ARBAUGH

By: */s/ Robert E. Soles. Jr.*
Robert E. Soles, Jr. (#0046707)
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1000 United Bank Plaza
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Counsel for Plaintiffs
Kenneth and Mary Jones

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

/s/ Robert E. Soles. Jr.
Robert E. Soles, Jr.

INSTRUCTIONS FOR SERVICE

TO THE CLERK:

Please serve the above-named defendants with a summons and a copy of the foregoing complaint by certified mail, return receipt requested, at the addresses listed in the caption of this complaint.

/s/ Robert E. Soles
Jr. Robert E. Soles, Jr.

APPENDIX F

[Filed 01 Jul-2, PM 2:55
(illegible) Court
Northern District of Ohio
Cleveland]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:01CV1616

KENNETH R. JONES, et al.,

Plaintiffs,
v.

FEDERAL INSURANCE COMPANY, et al.,

Defendants.

JUDGE: POLSTER
MAG. JUDGE GALLAS

NOTICE OF REMOVAL OF CIVIL ACTION

Defendant Federal Insurance Company, improperly denominated as Chubb Insurance Company (hereinafter "Federal Insurance Company"), gives notice to this Court, pursuant to 28 U.S.C. §1441, of the removal of Case No. 2001 CV 01440, now pending in the Court of Common Pleas, Stark County, Ohio. Removal to this Court is proper for the reasons set forth below.

1. Defendant, Federal Insurance Company, is presently a defendant in a civil action in the Court of Common Pleas , Stark County, Ohio, Case No. 2001 CV 01440 entitled Kenneth R. Jones, et al., v. Federal Insurance Company, et al. The Complaint and summons served on Federal Insurance Company on June 5, 2001 are attached hereto as Exhibit "A."

2. This case was initially filed on or about May 30, 2001. The two Defendants to the original Complaint are Federal Insurance Company and American Motorists Insurance Company.

3. This Notice of Removal is being filed within thirty (30) days from the receipt of the summons and Complaint from which it could first be ascertained that this case became and is removable. It is, therefore, timely filed pursuant to 28 U.S.C. §1446(b).

4. Upon information and belief, the Plaintiffs, Kenneth R. Jones and Mary B. Jones are residents of Stark County in the State of Ohio.

5. Defendant, Federal Insurance Company, is incorporated in Indiana, with its principal place of business in Warren, New Jersey. Defendant Federal Insurance Company is not a citizen of the State of Ohio under 28 U.S.C. §1332(d).

6. Defendant, American Motorist Insurance Company, is incorporated in Indiana with its principal place of business in Indiana. Defendant American Motorist Insurance Company is not a citizen of the State of Ohio under 28 U.S.C. § 1332(d).

7. Defendant, American Motorist Insurance Company consents to the removal of this action by Federal Insurance

Company.

8. The Plaintiffs have asserted claims for alleged loss of a foot sustained as a result of an injury sustained by Plaintiff Kenneth R. Jones on or about March 27, 1999. Plaintiffs are also alleging bad faith. The policy limits under said Policy are in excess of $75,000. Because Plaintiffs' damages allegedly exceed $75,000.00, the amount in controversy requirement necessary for this Court's exercise of jurisdiction is met. 28 U.S.C. §1332(a) (as amended effective January 17, 1997) Gaffold v. General Electric Company, 997 F.2d 150, 158 through 161 (6th Cir. 1993).

9. The United States District Court has jurisdiction over the civil action pursuant to 28 U.S.C. § 1332(a) as a matter in controversy exceeds the value of $75,000.00, exclusive of interest and costs.

10. A copy of this Notice of Removal has been filed with the appropriate state court pursuant to 28 U.S.C. §1446(d).

11. No bond is being filed as such former requirement was abolished by the Judicial Improvements and Access to Justice Act of 1988 (Pub. L. No.100-702), which became law on November 19, 1988.

WHEREFORE, Defendant, Federal Insurance Company hereby removes this action from the Court of Common Pleas, Stark County, Ohio to this Honorable Court.

Respectfully submitted,

OF COUNSEL:
GALLAGHER, SHARP,
FULTON & NORMAN

s/ D John Travis
D JOHN TRAVIS (0011247)
DAVID PAUL BRADLEY (0041966)
1501 Euclid Avenue
Seventh Floor - Bulkley Building
Cleveland, Ohio 44115-2108
Phone: (216) 241-5310
Fax: (216) 241-1608
E-mail: Djt@gsfn.com, Dpb@gsfn.com
Attorneys for Defendant
Federal Insurance Co.

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Removal of Civil Action has been sent by regular United States mail this 2 day of July 2001 to:

Robert E. Soles, Jr., Esq.
Brian L. Metz, Esq.
1000 United Bank Plaza
220 Market Avenue South
Canton, Ohio 44702

Attorney for Plaintiffs

Ronald A. Rispo, Esq.
Weston Hurd Fallon Paisley
& Howley L.L.P.
2500 Terminal Tower
50 Public Square
Cleveland, Ohio 44113-2241

Attorney for Defendant
American Motorists
Insurance Company

s/ D John Travis

D JOHN TRAVIS (0011247)
DAVID PAUL BRADLEY (0041966)
Attorneys for Defendant
Federal Insurance Company

PHIL G. GIAVASIS
STARK COUNTY CLERK OF COURTS

KENNETH R. JONES, ET AL.
PLAINTIFF.
VS. CASE NUMBER: 2001CV01440
ASSIGNED JUDGE:
CHARLES EDWIN BROWN

FEDERAL INSURANCE COMPANY
PART OF THE CHUBB GROUP OF
INSURANCE COMPANIES, ET AL.

DEFENDANT.

SUMMONS

May 31, 2001

TO THE FOLLOWING NAMED DEFENDANT:
FEDERAL INSURANCE COMPANY PART
OF THE CHUBB GROUP OF INSURANCE
COMPANIES

15 MOUNTAIN VIEW RD
WARRENC, NJ 07059

YOU HAVE BEEN NAMED A DEFENDANT IN A COMPLAINT FILED IN STARK COUNTY COURT OF COMMON PLEAS, STARK COUNTY COURT HOUSE, CANTON, OHIO 44702 BY:

KENNETH JONES -
13571 SOUSA ST
N LAWRENCE, OH 44666 PLAINTIFF.

A COPY OF THE COMPLAINT IS ATTACHED HERETO. THE NAME AND ADDRESS OF THE PLAINTIFF'S ATTORNEY IS:

Robert Soles, Jr.
1000 United Bank Plaza
220 Market Avenue South
Canton, OH 44702

YOU ARE HEREBY SUMMONED AND REQUIRED TO SERVE UPON THE PLAINTIFF'S ATTORNEY, OR UPON THE PLAINTIFF, IF HE HAS NO ATTORNEY OF RECORD, A COPY OF AN ANSWER TO THE COMPLAINT WITHIN TWENTY-EIGHT DAYS AFTER THE SERVICE OF THIS SUMMONS ON YOU, EXCLUSIVE OF THE DAY OF SERVICE. YOUR ANSWER MUST BE FILED WITH THE COURT WITHIN THREE DAYS AFTER THE SERVICE OF A COPY OF THE ANSWER ON THE PLAINTIFF'S ATTORNEY.

IF YOU FAIL TO APPEAR AND DEFEND, JUDGMENT BY DEFAULT WILL BE RENDERED AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

PHIL G. GIAVASIS
CLERK OF COURTS
STARK COUNTY, OHIO

BY: s/ D. Bennett Deputy Clerk

[Marked as Exhibit A]

[Filed
May 30, 2001
Phil G. Giavasis
Stark County Ohio
Clerk of Courts]

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

Case No.: 2001 CVO 1440

KENNETH R. JONES
13571 Sousa St.
N. Lawrence, Ohio 44666

and

MARY B. JONES
13571 Sousa St.
N. Lawrence, Ohio 44666

Plaintiffs,

v.

FEDERAL INSURANCE COMPANY,
Part of the Chubb Group of Insurance
Companies
15 Mountain View Road
Warren, NJ 07059

and

AMERICAN MOTORISTS INSURANCE
COMPANY
1 Kemper Drive
Long Grove, IL 60049-0001

Defendants.

COMPLAINT
BREACH OF CONTRACT
AND BAD FAITH

JURY DEMAND ENDORSED HEREON

Judge: Brown

Plaintiffs, Kenneth Jones and Mary Jones ("Plaintiffs"), for their Complaint against Defendants, Federal Insurance Company, part of the Chubb Group of Insurance Companies ("Federal") and American Motorists Insurance Co. ("American"), state as follows:

GENERAL ALLEGATIONS

1. Plaintiffs are residents of the State of Ohio and are currently domiciled at 13571 Sousa Street, North Lawrence, Stark County, Ohio 44666.

2. Upon information and belief, Federal is an insurance company regularly doing business in Stark County, Ohio.

3. Upon information and belief, American is an insurance company regularly doing business in Stark County, Ohio.

4. On March 27, 1999, Plaintiff Kenneth Jones was involved in an automobile collision in which another driver negligently failed to yield the right of way to Mr. Jones and struck Mr. Jones as he was operating his motorcycle.

5. As a result of the collision, Mr. Jones was forced to have his left foot, ankle and calf amputated, resulting in substantial medical bills and expenses, immense pain and suffering and lost wages and lost earning capacity.

6. Plaintiff Mary Jones has been damaged through the loss of Kenneth Jones' society, companionship and consortium.

7. Plaintiffs are insureds under Federal insurance policies 3710-62-62 ERG and/or 7320-04-14 and prior policies with respect to an automobile collision that occurred on March 27, 1999 and in which Mr. Jones was seriously injured.

8. The Federal insurance policy was issued to American Electric Power Co., Inc.

9. At all times relevant herein, Plaintiff Kenneth Jones was an employee of American Electric Power, Co., Inc.

10. Plaintiffs are insureds under American insurance policy 3MG 0786199-01 and prior policies with respect to an automobile collision that occurred on March 27, 1999 and in which Mr. Jones was seriously injured.

11. The American insurance policy was issued to The M.K. Morse Co.

12. At all times relevant herein, Plaintiff Mary Jones was an employee of The M.K. Morse Co.

FIRST CAUSE OF ACTION
BREACH OF CONTRACT
Uninsured Motorists Benefits

13. Plaintiffs restate the allegations contained in paragraphs 1 through 12 as if fully rewritten herein.

14. All premium payments due to American on all insurance policies, were timely paid, and American provided a policy which was in effect on March 27, 1999, the date of the automobile collision in which Mr. Jones was injured.

15. Plaintiffs are insureds under American insurance policy, 3MG 0786199-01 and prior policies with respect to an automobile collision that occurred on March 27, 1999 and in which Mr. Jones was seriously injured.

16. American is required to provide coverage to Plaintiffs under the Ohio Revised Code and under applicable Ohio Supreme Court Authority, which require all motor vehicle liability policies to offer underinsured or uninsured coverage to provide protection for their insureds or such coverage arises by operation of law.

17. Counsel for Plaintiffs have demanded American to provide underinsured motorist coverage to Plaintiffs for any injuries that would not be compensable under the tortfeasor's liability insurance policy.

18. American has denied uninsured/underinsured motorists coverage for the March 27, 1999 collision, thereby materially breaching the contract of insurance Plaintiffs hold with American.

19. As a direct and proximate result of American's breach of contract, Plaintiffs are entitled to compensatory damages in excess of Twenty-five Thousand Dollars ($25,000).

SECOND CAUSE OF ACTION
BAD FAITH

20. Plaintiffs restate the allegations contained in paragraph 1 through 19 is if fully rewritten herein.

21. Despite demand for payment, American has unreasonably and unlawfully failed and refused to provide uninsured/underinsured motorist coverage to Plaintiffs.

22. The actions of American in failing and refusing to provide coverage of any claims in this matter is in bad faith, entitling Plaintiffs to an award of compensatory and punitive damages, in excess of One Hundred Thousand Dollars ($100,000).

THIRD CAUSE OF ACTION
BREACH OF CONTRACT
Uninsured Motorists Benefits

23. Plaintiffs restate the allegations contained in paragraphs 1 through 22 as if fully rewritten herein.

24. All premium payments due to Federal on all insurance policies, were timely paid, and Federal provided a policy which was in effect on March 27, 1999, the date of the automobile collision in which Mr. Jones was injured.

25. Plaintiffs are insureds under Federal insurance policy 3710-62-62 ERG and prior policies with respect to an automobile collision that occurred on March 27, 19999 and in

which Mr. Jones was seriously injured.

26. Federal is required to provide coverage to Plaintiffs under the Ohio Revised Code and under applicable Ohio Supreme Court Authority, which require all motor vehicle liability policies to offer underinsured or uninsured motorist coverage to provide protection for their insureds or such coverage arises by operation of law.

27. Counsel for Plaintiffs have demanded Federal to provide underinsured motorist coverage to Plaintiffs for any injuries that would not be compensable under the tortfeasor's liability insurance policy.

28. Federal has denied uninsured/underinsured motorist coverage for the March 27, 1999 collision, thereby materially breaching the contract of insurance Plaintiffs hold with Federal.

29. As a direct and proximate result of Federal's breach of contract, Plaintiffs are entitled to compensatory damages in excess of Twenty-five Thousand Dollars ($25,000).

FOURTH CAUSE OF ACTION
BAD FAITH

30. Plaintiffs restate the allegations contained in paragraph 1 through 29 as if fully rewritten herein.

31. Despite demand for payment, Federal has unreasonably and unlawfully failed and refused to provide uninsured/underinsured motorist coverage to Plaintiffs.

32. The actions of Federal in failing and refusing to provide coverage of any claims in this matter is in bad faith,

entitling Plaintiffs to an award of compensatory and punitive damages, in excess of One Hundred Thousand Dollars ($100,000).

WHEREFORE, Plaintiffs, Kenneth R. Jones and Mary B. Jones, demand judgment against Defendants, Federal Insurance Company, part of the Chubb Group of Insurance Companies and American Motorists Insurance Co., jointly and severally as follows:

(A) For compensatory damages in excess of Twenty-five Thousand Dollars ($25,000);

(B) For punitive damages in excess of One Hundred Thousand Dollars ($100,000);

(C) For their attorney's fees expended in seeking coverage under Plaintiffs' policies of insurance with Federal and American;

(D) For their costs incurred herein; and

(E) For such other and further relief as this Court deems just and equitable.

Respectfully submitted,
BLACK, MCCUSKEY, SOLES & ARBAUGH

By: s/ Robert E. Soles, Jr.
Robert E. Soles, Jr. (#0046707)
Brian L. Metz (#0070943)
1000 United Bank Plaza
220 Market Avenue South
Canton, Ohio 44702
Telephone: (330) 456-8341
Telefax: (330) 456-5756
Counsel for Plaintiffs
Kenneth and Mary Jones

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable

s/ Robert E. Soles, Jr.
Robert E. Soles, Jr.

INSTRUCTIONS FOR SERVICE

TO THE CLERK:

Please serve the above-named defendants with a summons and a copy of the foregoing complaint by certified mail, return receipt requested, at the addresses listed in the caption of this complaint.

s/ Robert E. Soles, Jr.
Robert E. Soles, Jr.

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

Case No. 2001 CV 01440

KENNETH R. JONES, et al.,

Plaintiffs,

v.

FEDERAL INSURANCE COMPANY, et al.,

Defendants.

JUDGE BROWN

NOTICE OF FILING OF REMOVAL
TO THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO

The court and plaintiffs are hereby notified that the defendant has filed a Notice of Removal with the United States District Court for the Northern District of Ohio on the 2nd day of July, 2001. With this filing, the action now stands removed from the Court of Common Pleas, Stark County, Ohio, to the United States District Court for the Northern District of Ohio, Eastern Division. A copy of the Notice of Removal is attached and incorporated herein as Exhibit A.

Respectfully submitted,

OF COUNSEL:
GALLAGHER, SHARP,
FULTON & NORMAN

s/ D John Travis
D JOHN TRAVIS (0011247)
DAVID PAUL BRADLEY (0041966)
1501 Euclid Avenue
Seventh Floor - Bulkley Building
Cleveland, Ohio 44115-2108
Phone: (216) 241-5310
Fax: (216) 241-1608
E-mail: Djt@gsfn.com, Dpb@gsfn.com
Attorneys for Defendant
Federal Insurance Co.

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Filing of Removal to the United States District Court, Northern District of Ohio has been sent by regular United States mail this 2 day of July 2001 to:

Robert E. Soles, Jr., Esq.
Brian L. Metz, Esq.
1000 United Bank Plaza
220 Market Avenue South
Canton, Ohio 44702

Attorney for Plaintiffs

Ronald A. Rispo, Esq.
Weston Hurd Fallon Paisley
& Howley L.L.P.
2500 Terminal Tower
50 Public Square
Cleveland, Ohio 44113-2241

**Attorney for Defendant
American Motorists
Insurance Company**

s/ D John Travis

D JOHN TRAVIS (0011247)
DAVID PAUL BRADLEY (0041966)
Attorneys for Defendant
Federal Insurance Company

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01 CV 2633

ROBERT REESE, *et al.*,

Plaintiffs

v.

FIDELITY & GUARANTY INSURANCE UNDERWRITERS, INC.,

Defendant

JUDGE SOLOMON OLIVER, JR.

ORDER

Robert and Renee Reese ("Plaintiffs") filed this suit on October 16, 2001, against Defendant Fidelity & Guaranty Insurance Underwriters Incorporated ("Fidelity") in the Cuyahoga County Court of Common Pleas. Fidelity timely removed the action to this court on November 20, 2001, based on diversity of citizenship. On November 28, 2001, Plaintiffs filed a Motion to Remand (ECF No. 6). For the reasons stated herein, the Motion is granted.

I. BACKGROUND

Plaintiffs allege that, on or about June 7, 1997, Renee and her son, Austin Reese, were injured by a hit-and-run

motorist. The accident caused Austin serious and permanent physical and mental injuries. Because the tortfeasor was uninsured or underinsured, Plaintiffs sued in state court, seeking uninsured/underinsured motorist ("UM/UIM") coverage from Fidelity on the basis that Plaintiffs are insureds pursuant to Renee Reese's employer's policy with Fidelity. Her employer is Sarcom, Inc. ("Sarcom").

Plaintiffs' claim against Defendant is based on the Ohio Supreme Court case *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*, 85 Ohio St.3d 660 (1999). *Scott-Pontzer* examines the scope of Ohio Revised Code § 3937.18, the section which establishes UM/UIM coverage requirements in Ohio. In *Scott-Pontzer*, the Ohio Supreme Court found that absent express rejection or other agreement between the insured business and the insurer, a business is presumed, by operation of law, to possess UM/UIM automobile coverage and the business insured's employees also receive the UM/UIM automobile coverage. *Scott-Pontzer*, 85 Ohio St.3d at 665-666. Pursuant to *Scott-Pontzer*, Plaintiffs argue that under the policy held between Sarcom and Fidelity, they are eligible to obtain UM/UIM coverage.

II. DISCUSSION

Here, this court is asked to determine whether Plaintiffs' motion to remand should be granted because diversity jurisdiction does not exist pursuant to 28 U.S.C. § 1332. In order for a court to possess diversity of citizenship jurisdiction, all parties must be completely diverse, i.e., if any defendant is deemed to have the same citizenship as that of any plaintiff, diversity is destroyed. *See Caudill v. N. Am. Media Corp.*, 200 F.3d 914, 916 (6th Cir. 2000).

A corporation is a citizen of any state where it has been

incorporated and of the state where it has its principal place of business. 20 U.S.C. § 1332(c). Fidelity is a citizen of the State of Wisconsin and West Virginia. Plaintiffs are citizens of the State of Ohio. There is no dispute regarding these facts. Considered on these facts alone, there would be diversity of citizenship jurisdiction. However, the issue presented to this court is whether § 1332(c)(1) requires this court to consider Defendant Fidelity to be a citizen of the state of which its insured, Sarcom, is a citizen, i.e., Ohio. If it does, there would be no diversity of citizenship jurisdiction.

Section 1332(c)(1) states:

> In any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well a any State by which the insurer has been incorporated and of the State where it has its principal place of business.

Plaintiffs argue that their *Scott-Pontzer* type claim is a "direct action" against the insurer, Fidelity, pursuant to "a policy or contract of liability insurance" to which the insured, Sarcom, is not joined as a party-defendant. Therefore, Fidelity is deemed to be a citizen of the state of which Sarcom is a citizen. As a consequence, this case should be remanded back to state court. In support of their argument, Plaintiffs cite the following recent decisions of the court: *Kormanik v. St. Paul Fire and Marine Ins. Co.*, slip op., case no. 5:01-CV-2122 (Oct. 19, 2001) (Polster, J.), *Kohus v. Hartford Ins. Co.*, slip op., case no. 1:01-CV-1179 (Nov. 19, 2001) (Matia, J.), *Comella v. St. Paul Mercury Ins. Co.*, 1:00-CV-2664, 2001 WL 1597996 (N.D.

Ohio Dec. 11, 2001) (O'Malley, Jr.) and *Carcioppolo v. CHUBB Group of Ins. Co.*, slip op., case no. 1:00-CV-2988 (Dec. 11, 2001) (O'Malley, J.).

Fidelity argues that the above cases are wrongly decided and that the majority of the cases analyzing the scope of 28 U.S.C. § 1332(c)(1) construe the provision more narrowly than the courts in the above-cited cases. It argues that: (A) § 1332(c)(1) does not destroy diversity in the *Scott-Pontzer* line of cases because: (1) the situations involved therein do not constitute a "direct action" within the meaning of 28 U.S.C. § 1332(c)(1); and (2) the Fidelity policy, under which Plaintiffs seek to recover, does not constitute a "liability insurance" policy within the meaning of 28 U.S.C. § 1332(c)(1); (B) pursuant to *Gooden v. National Fire Insurance Company*, slip op., case no. 5:01CV2138, this court should decline to remand; and (C) if § 1332(c)(1) is found to be applicable, and this case is remanded back to state court, its constitutional rights under the Due Process and Equal Protection Clauses of the Fifth Amendment to the Constitution of the United States would be violated, and that such a limit on this court's jurisdiction violates Article III, Section 2 of the United States Constitution.

(A) Whether § 1332(c)(1) Destroys in *Scott-Pontzer* Actions?

(1) Whether the "Direct Action" Exception of § 1332(c)(1) is Applicable to *Scott-Pontzer* Actions?

Fidelity urges this court to find that the "direct action" exception under § 1332(c)(1) destroys diversity only where suit is brought against the tortfeasor's insurer without first obtaining judgment against the tortfeasor himself. Therefore, because this *Scott-Pontzer* action is a suit by a tort victim against an insurer who is unrelated to the tortfeasor, this matter does not qualify as

a "direct action." For the reasons stated herein, the court does not find this position to be well taken.

28 U.S.C. § 1332(c)(1) was drafted by Congress to address laws that had been enacted in Louisiana and Wisconsin. *Northbrook Nat'l Ins. Co. v. Brewer*, 493 U.S. 6, 10 (1989). These direct action laws permitted:

> one claiming injury at the hands of another who was covered by liability insurance to sue the liability insurance carrier rather than the alleged wrongdoer. Thus even where the plaintiff and the alleged tortfeasor were residents of the same state, if the liability insurer was a citizen of a different state, diversity jurisdiction could be asserted in such a direct action.

Ford Motor Co. v. Ins. Co. N. America, 669 F.2d 421, 424 (6th Cir. 1982). Because the Louisiana and Wisconsin laws "resulted in a flood of essentially local lawsuits clogging already crowded district court dockets," Congress drafted § 1332(c)(1) to "cloak[] the nonresident insurer with the citizenship of its insured [in order to] remove the basis of diversity jurisdiction." *Id.*

Immediately following the enactment of § 1332(c)(1), many courts, including the Sixth Circuit, narrowly interpreted it, indicating, albeit *in dicta*, that it might be applied only in the particular circumstances which prompted Congress to draft the provision. *Id.* (citing *Henderson v. Selective Ins. Co.*, 369 F.2d 143 (6th Cir. 1966); *White v. United States Fidelity & Guaranty Co.*, 356 F.2d 746, 747-48 (1st Cir. 1966); *Inman v. MFA Mutual Ins. Co.*, 264 F. Supp. 727 (E.D. Ark. 1967); *Walker v. Firemans Fund Ins. Co.*, 260 F. Supp. 95 (D. Mont. 1966); *Carvin v. Standard Accidental Ins. Co.*, 253 F. Supp. 232 (E.D.

Tenn. 1966), *aff'd on merits without discussion of jurisdiction*, 395 F.2d 326 (6th Cir. 1968)). For example, in *Henderson*, the Sixth Circuit found that the provision did not apply to an action brought by judgment creditors of a negligent driver against insurers of an automobile dealer and automobile salesman who allowed the negligent driver to drive one of the dealership's vehicles. *Id.* at 149. The court reasoned that because § 1332(c)(1) was enacted to address the situations arising in the States of Wisconsin and Louisiana where "the enactment of 'direct action' statutes in those states permitt[ed] suits directly against the insurance companies without joining the insured," it could not apply to an action brought by a judgment creditor against an insurer. *Id.* In general, these early cases focused on the specific circumstances which gave rise to § 1332(c)(1) and then concluded that the action was not a "direct action" within the meaning of § 1332(c)(1) or that the provision was inapplicable because the insurance involved was not "liability insurance." *Ford*, 669 F.2d at 424.

More recently, however, the Sixth Circuit as well as other courts have recognized that the terms in § 1332(c)(1) should be interpreted "more broadly." *Ford*, 669 F.2d at 424 (citing *Aetna Cas. & Surety Ins. Co. v. Greene*, 606 F.2d 123, 126 (6th Cir. 1979)); *Hernandez v. Travelers Ins. Co.*, 489 F.2d 721 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974); *O.M. Greene Livestock Co. v. Azalea Meats, Inc.*, 516 F.2d 509 (5th Cir. 1975); *Torres v. Hartford Ins. Co.*, 588 F.2d 848 (1st Cir. 1978); *See, e.g., Stockton v. General Accident Ins. Co.*, No. 89-5492, 1990 WL 20477, *3 (6th Cir. March 6, 1990).

In *Aetna Casualty & Surety Insurance Company* and *Ford*, the Sixth Circuit found that the reach of §1332(c)(1) should be extended beyond the factual circumstances which served as its impetus, in large part, because the language of § 1332(c)(1) was "inclusive," *Ford*, 669 F.2d at 425, and because

"Congress, when it used the terms 'direct action' and 'liability insurance' in the amendment to § 1332(c) did not intend the amendment to apply only to traditional tort claims." *Aetna Cas. & Surety Ins. Co.*, 606 F.3d at 126. In applying this more liberal interpretation, the Sixth Circuit found that § 1332(c)(1) applied to actions brought pursuant to no-fault statutes, *see Ford*, 669 F.2d at 425 (citing *McMurray v. Prudential Property & Cas. Ins. Co.*, 458 F. Supp. 209 (E.D. Mich. 1978)), as well as to actions brought pursuant to workers' compensation laws. *See Aetna Casualty & Surety Ins. Co.*, 606 F.2d at 126.

In *Aetna Casualty & Surety Insurance Company*, the Sixth Circuit found that Tennessee's workers' compensation law involved the type of "direct action" procedure "that Congress intended to regulate through § 1332(c)(1)." *Id.* at 125. The Sixth Circuit concluded that because Tennessee's workers' compensation law "provide[d] for 'direct actions' by injured residents against out-of-state insurance carriers," it fell within the ambit of the meaning of the provision's term "direct action." *Id.* at 125-126.

In *Ford*, the Sixth Circuit found that Michigan's no-fault statute involved the type of "direct action" procedure that § 1332(c)(1) was intended to regulate. In *Ford*, the State of Michigan had abolished tort liability arising from the ownership, maintenance or use of a motor vehicle in Michigan. *Id.* at 425. It provided, in its place, "personal protection benefits" and "property protection benefits" to help those injured or those suffering property damage originating from the ownership, maintenance or use of automobiles. *Id.* Those benefits were provided on a no-fault basis rather than on the basis of traditional tort liability. *Id.* While acknowledging that no-fault statutes had not existed at the time § 1332(c)(1) was drafted, the Sixth Circuit found that no-fault insurance operated "in exactly the same way as the Louisiana and Wisconsin direct action

statutes." *Id.* Michigan's no-fault statute permitted "a person claiming injury or damage arising from the ownership or use of a motor vehicle to sue directly the insurer rather than the owner or operator of the vehicle." *Id.* As such, no-fault actions were direct actions within the meaning of § 1332(c)(1). The Sixth Circuit concluded that if § 1332(c)(1) did not apply:

> the same 'back door diversity' which Congress eliminated by the 1964 amendment would be possible under no-fault. No-fault represents a latter-day attempt by the states to improve the mechanism for recovery by those injured and damaged in accidents arising out of the use of motor vehicles. Given Congress' reaction to earlier state legislation which permitted direct actions, no-fault should not be held to expand the jurisdiction of federal courts.

Id.

The *Ford* opinion is replete with language indicating that the term "direct action" should be interpreted broadly, including the following: "when [Congress] used the term 'direct action'[] . . . in the amendment to § 1332(c), [it] did not intend the amendment to apply only to traditional tort claims,'" *Ford*, 669 F.2d at 424 (citing *Aetna Cas. & Surety Ins. Co.*, 606 F.2d at 126), "the language of the amendment is inclusive rather than exclusive," *Id.* at 425, and "we should not limit application of the amendment to the specific conditions which gave it birth," *Id.* This language leads this court to conclude that it must interpret terms of § 1332(c)(1) broadly where "the same 'back door diversity' which Congress eliminated by the 1964 amendment would" result if it did not act otherwise. *Id.*

This conclusion does not change upon examination of

the Sixth Circuit's most recent discussion of "direct action." *Stockton v. General Accident Insurance Co.*, No. 89-5492, 1990 WL 20477, *3 (6th Cir. March 6, 1990). In this unpublished opinion, the Sixth Circuit defined the term "'direct action,' as used in [§ 1332(c)(1)], [as][] an action that under applicable state law may be brought directly against the insurer by the tort claimant prior to entry of any judgment against the alleged tortfeasor." *Id.* While one could argue this definition was the Sixth Circuit's attempt to limit the application of § 1332(c)(1) to circumstances involving suits against the tortfeasor's insurer, this case does not so hold. Indeed, this definition was not new. It emphasizes the required timing of the lawsuit for purposes of determining the applicability of § 1332(c)(1); it must be brought prior to any judgment being rendered against the tortfeasor. *Stockton* does not limit the application of § 1332(c)(1) to cases involving the insurer of the tortfeasor. Read in this manner, the case is entirely consistent with *Comella v. St. Paul Mercury Ins. Co.*, 1:00-CV-2664, 2001 WL 1597996 (N.D. Ohio Dec. 11, 2001) (O'Malley, J.), *Kormanik v. St. Paul Fire and Marine Ins Co.*, slip op., case no. 5:01-CV-2122 (Oct. 19, 2001) (Polster, J.), *Verhovec v. Wausau Ins. Co.*, slip op., case no. 5:01-CV-662 (Nov. 14, 2001) (Polster, J.); *Kohus v. Hartford Ins. Co.*, slip op., case no. 1:01CV-1179 (Nov. 19, 2001) (Matia, J.); Comella, 2001 WL 1597996, at *4 and *Carcioppolo v. CHUBB Group of Ins. Co.*, slip op., case no. 1:00-CV-2988 (Dec. 11, 2001) (O'Malley, J.). Each of these cases involved plaintiffs bringing actions, pursuant to applicable law, as outlined by the Ohio Supreme Court in *Scott-Pontzer*, against the defendant insurance companies prior to entry of any judgment against the tortfeasor. Thus, these *Scott-Pontzer* cases meet the *Stockton* definition of "direct action" under § 1332(c)(1).

There are striking similarities between those cases the Sixth Circuit has previously found to involve direct actions and *Scott-Pontzer*-type cases. The type of direct action statutes

involved in Wisconsin and Louisiana, the Michigan no-fault statutes involved in *Ford* and the *Scott-Pontzer*-type cases all involve modifications of the traditional tort scheme in favor of providing broader remedies for those injured in motor vehicle accidents. *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660 (1999). Louisiana and Wisconsin's direct action laws and those the Sixth Circuit has found to be "direct actions," such as Michigan's no-fault statute and Tennessee's workers' compensation law, permitted tort claimants to bring direct actions against insurers without joining the insureds or first seeking judgement against the tortfeasor. *Ford*, 669 F.2d at 425; *Aetna Cas. & Surety Ins. Co.*, 606 F.2d at 125. Likewise, the *Scott-Pontzer* line of cases affords a tort claimant the ability to bring a direct action, by operation of law, against an insurer for coverage without joining the third-party insured or requiring the tort claimant to first seek judgment against the tortfeasor. *Comella*, 2001 WL 1597996, at *4. As such, it is consistent with the Sixth Circuit's most recent definition of direct action inasmuch as it involves a tort claimant seeking to bring an action, pursuant to state law, directly against the insurer, to which the insured is not joined as a party defendant, prior to entry of any judgment against the alleged tortfeasor. *See Comella v. St. Paul Mercury Ins. Co.*, 1:00-CV-2664, 2001 WL 1597996, *4 (N.D. Ohio Dec. 11, 2001) (O'Malley, J.) (citing *Stockton v. General Accident Insurance Co.*, No. 89-5492, 1990 WL 20477, *3 (6th Cir. March 6, 1990)). Like the Michigan no-fault statutes, and the Louisiana and Wisconsin direct action statutes, which created "back door diversity" resulting in a "swell" of "essentially local lawsuits" being brought in federal courts, *Aetna Cas. & Surety Ins. Co.*, 606 F.2d at 125; *See also Ford*, 669 F.2d at 424, the Ohio Supreme Court's interpretation of O.R.C. § 3937.18 in *Scott-Pontzer* has created "back door diversity" which has resulted in a surge of these "essentially local lawsuits" in federal district courts. *See Kormanik*, slip op. 4 (*Scott-Pontzer* cases resulted in burgeoning number of cases

in federal courts); *Kohus*, slip op. at 4.

Accordingly, this court finds that the present *Scott-Pontzer* action constitutes a "direct action" within the meaning of § 1332(c)(1).

(2) Whether Fidelity's Policy Falls Within the Meaning of "policy or contract of liability insurance" Under 28 U.S.C. § 1332(c)(1)?

Fidelity argues that § 1332(c)(1) does not apply because:

> "the term 'liability insurance' is applied [only] to contracts which provide for indemnity against liability. . . . Liability insurance is that form of insurance by which the insured is indemnified against loss or liability on account of bodily injuries sustained by others, . . . or in a broader sense, against loss or liability on account of injuries to property . . . A policy of liability insurance is a policy that indemnifies against the condition of becoming liable. . . . "

Aetna Casualty & Surety Ins. Co. v. Greene, 606 F.2d 123, 126 (6th Cir. 1979). Fidelity maintains that inasmuch as the Plaintiffs seek UIM coverage as claimed insureds under the Fidelity policy, and not indemnification against tort liability, Plaintiffs do not seek to recover under their policy as "liability insurance" within the meaning of 28 U.S.C. § 1332(c)(1). *Id.* (citations omitted). This argument is not well taken.

Here, Plaintiffs do not bring suit against Fidelity pursuant to an insurance contract entered into with the insurer. Rather, they bring their action pursuant to state statute which, "as interpreted by the Ohio Supreme Court in *Scott-Pontzer* . .

. [allows] 'a person claiming injury or damage arising from the ownership or use of a motor vehicle to sue [his [or her] employer's] insurer rather than the owner or operator of the vehicle.'" *Comella*, 2001 WL 1597996, *4 (quoting *Ford*, 669 F.2d at 425). As discussed above, the effect caused by the Ohio Supreme Court's statutory interpretation of O.R.C. § 3937.18(A) is similar to that which was caused by the passage of the no-fault statute addressed in *Ford*. Just as the no-fault statute "represent[ed] a latter-day attempt by the state [] to improve the mechanism for recovery by those injured and damaged in accidents arising out of the use of motor vehicles," *Ford*, 669 F.2d at 425-426, the *Scott-Pontzer* line of cases are an attempt to do the same. Inasmuch as the Sixth Circuit found in *Ford* that "'Congress, when it used the term[] . . .'liability insurance', did not intend the amendment to apply only to traditional tort claims,'" *Ford*, 669 F.2d at 424 (citing *Aetna Casualty & Surety Ins. Co.*, 606 F.2d at 126), this court finds that Plaintiffs' claims against Fidelity, pursuant to insurance coverage created, by operation of law, fits the meaning of the language "liability insurance."

Admittedly, the facts in *Ford* are somewhat distinguishable from this case. In *Ford*, the tortfeasor was the insured. Here, the tortfeasor, a hit-and-run driver, is a non-party to the suit and the insured is Plaintiffs' employer. However, this court finds, as did the court in *Comella v. St. Paul Mercury Ins. Co.*, 1:00-CV-2664, 2001 WL 1597996 (N.D. Ohio Dec. 11, 2001), that the logic surrounding the application of § 1332(c)(1) is the same. *Comella*, 2001 WL 1597996 at *5.

In *Comella*, the plaintiffs, husband and wife, brought a *Scott-Pontzer* claim in state court against the insurance companies of the husband's employer for underinsured motorist coverage. The husband had been injured in an automobile accident while he was acting in the scope of his employment.

The individual who caused the accident was underinsured. Plaintiffs brought a breach of contract claim, seeking a determination that they were covered under the policy. After removal of the action, based on diversity jurisdiction, plaintiffs filed a motion to remand based on the ground that § 1332(c)(1) destroyed the court's subject matter jurisdiction. *Comella*, 2001 WL 1597996, at *1.

In finding that the insurance coverage created by operation of law in *Scott-Pontzer* fell within the meaning of "policy or contract of liability insurance," Judge O'Malley stated that:

> in both this case and in *Ford*, it is an artifact of state law that permits a plaintiff to: (a) name an insurance company as a defendant (b) without naming the tortfeasor as a party (c) to recover damages caused by the absent tortfeasor. Thus, in *Ford*, the Michigan no-fault statute allowed the plaintiff (Ford Motor) to sue an insurer (INA) to recover damages caused by the tortfeasor (Refiners), without joining the tortfeasor as a party. *Ford*, 669 F.2d at 422. In this case, Ohio law, by virtue of *Scott-Pontzer* . . ., allows the plaintiff (*Comella*) to sue an insurer (St. Paul and Guaranty National) to recover damages caused by the tortfeasor (Betty Doran), without joining the tortfeasor as a party. Indeed, in both this case and *Ford*, state law makes insurance benefits available to an injured party "[other] than on the basis of traditional tort liability, and actions to secure the[se] benefits may be maintained directly against the insurer of the vehicle rather than the insured." *Id.* at 425. The factual circumstances of this case may be

> different from those of *Ford*, but the logic leading to the application of § 1332(c)(1) is the same.

Comella, 2001 WL 1597996, at *5.

In this *Scott-Pontzer* case, as in *Comella*, "insurance benefits [are made] available to an injured party "[other] than on the basis of traditional tort liability, and actions to secure the[se] benefits may be maintained directly against the insurer of the vehicle rather than the insured." *Comella*, 2001 WL 1597996, at *5 (citing *Ford*, 669 F.2d at 425). Just as the United States Supreme Court in *Northbrook* held in regard to Louisiana and Wisconsin's direct action laws, *Scott-Pontzer* actions do "not come within the spirit of the intent of the basic purpose of the diversity jurisdiction of the Federal judicial system." *Northbrook*, 493 U.S. at 10 (citing S. Rep. No. 1308, at 7, U.S. Code Cong. & Admin. News 2784 (1964)). Although *Ford* may be factually different, the logic leading to the application of § 1332(c)(1) is the same.

(B) Whether This Court Should Decline To Remand Pursuant To *Gooden v. National Fire Insurance Company*?

Fidelity argues that because Plaintiffs seek legal relief, i.e., monetary damages, as well as equitable relief, i.e., a declaration that they should receive UM/UIM benefits, pursuant to Judge Polster's recent opinion in *Gooden v. National Fire Insurance Company*, slip op., case no. 5:01CV2138 (November 14, 2001) (Polster, J.), this court should decline to remand. This argument is not well taken.

In *Gooden*, the plaintiffs were the wife and children of an individual who was killed by a negligent driver. Pursuant to *Scott-Pontzer*, the plaintiffs filed an action for equitable relief in

the form of a declaratory judgment under the Ohio Declaratory Judgment Statute O.R.C. § 2721 in the Stark County Court of Common Pleas against certain liability insurance carriers that had issued liability policies to the decedent's employer. In the same action, the plaintiffs also sought legal relief in the form of a monetary award for breach of contract in the event the state trial court declared coverage was available. Following removal based on diversity jurisdiction, plaintiffs moved the federal court to abstain from exercising jurisdiction or to stay the federal action by remanding the case to state court for resolution. In this opinion, Judge Polster found that Plaintiffs' complaint went "well beyond a mere request for declaratory relief" and therefore ti was "improper for the court to decline to exercise its jurisdiction over the case" by granting the motion to abstain or stay by remand. *Gooden*, slip op., 2.

Gooden is inapposite to this action. Here, Plaintiffs have not asked this court to abstain or stay an action over which it has jurisdiction. Rather, they urge this court to remand the action pursuant to *Kormanik* and its progeny on the ground that under § 1332(c)(1), there is no diversity jurisdiction in this case. Therefore, *Gooden* is not relevant to this court's decision whether to remand.

(C) Fidelity's Constitutional Challenges

Fidelity asserts that this court's decision to remand the present action back to state court violates its due process and equal protection rights under the Fifth Amendment. Moreover, Fidelity argues that the application of § 1332(c)(1) amounts to an unconstitutional limitation of this court's jurisdiction, in violation of Article III, Section 2 of the United States Constitution. This court finds that these arguments are not well taken.

(1) Whether Remand Violates Fidelity's Fifth Amendment Due Process Rights?

Fidelity argues that pursuant to Article III, Section 2 of the United States Constitution, they have a right to proceed with this matter before an impartial federal court and that denial of this right, i.e., remand of this action to a presumptively biased state court, is a denial of its procedural and substantive due process rights.

Article III, section 2 states, in pertinent part, that "[t]he judicial Power [of federal courts] shall [be] extend[ed] . . . to Controversies . . . between Citizens of different States." U.S. Const. art. III § 2. However, in order for jurisdiction to exist, there must not only be constitutional jurisdiction, but statutory jurisdiction as well. *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). It is clear that in several respects, Congress has not chosen to endow trial courts with the whole of diversity jurisdiction permitted by the Constitution. For example, though the Constitution does not impose a monetary limitation on such jurisdiction, the statute, 28 U.S.C. § 1332 provides for jurisdiction over such cases only where the amount in controversy is in excess of $75,000, plus interest and costs. Thus, there is no impediment to Congress limiting diversity jurisdiction as it has done in § 1332(c)(1). Since there is no right to a federal forum under these circumstances, there can be no violation of the right to due process. Furthermore, Fidelity's right to sue generally has not been abridged as it may still sue in state court.

(2) Whether Remand Violates Fidelity's Right to Equal Protection under the Fifth Amendment?

Fidelity argues that the interpretation of § 1332(c)(1) in a manner which supports remand denies them equal protection

under the Fifth Amendment to the United States Constitution. Fidelity's equal protection argument is not well taken. In making this determination, the court applies the rational relationship test; Fidelity has not shown any race or class-based animus, triggering a higher level of scrutiny. *Equality Foundation v. City of Cincinnati*, 128 F. 3d 289, 293 (6th Cir. 1997). In regard to § 1332(c)(1), there is a rational relationship between the denial of diversity jurisdiction in cases such as this one and the objective of Congress to reduce a flood of what would normally be local litigation into federal court. Therefore, there is no violation of Fidelity's rights under the equal protection component of the due process clause of the Fifth Amendment.

(3) Whether Application of § 1332(c)(1) Amounts to an Unconstitutional Limitation of This Court's Jurisdiction in Violation of Article III, Section 2 of the United States Constitution

For the reasons stated in (1) above, there is no violation of the Constitution for Congress' failure to endow the trial courts with the whole of what is jurisdictionally permissible under the Constitution of the United States. Therefore, this court's decision to remand the present matter, pursuant to § 1332(c)(1), a limitation imposed by Congress, is not a violation of Article III, Section 2 of the United States Constitution.

IV. CONCLUSION

Plaintiffs' action pursuant to *Scott-Pontzer* constitutes a "direct action" within the meaning of § 1332(c)(1). Also, the Ohio Supreme Court's statutory interpretation in *Scott-Pontzer* creates insurance coverage, by operation of law, that fits the meaning of the term "liability insurance" under 28 U.S.C. § 1332(c)(1). Since the insurer Fidelity is deemed a citizen of the

same state as its insured, Sarcom, i.e., Ohio and Plaintiffs are also Ohio citizens, there is no diversity of citizenship. Consequently, Plaintiff's Motion to Remand (ECF No. 6) is granted.

IT IS SO ORDERED.

/S/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

March 22, 2002

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Case No. 5:00CV1191

ESTATE OF JASON MONAHAN,

Plaintiff,

v.

AMERICAN STATES INSURANCE CO., et al.

Defendants.

JUDGE: PETER C. ECONOMUS
Dated: December 20, 2001

MEMORANDUM OPINION AND ORDER

This matter is before the Court on *sua sponte* on the issue of subject matter jurisdiction. On November 14, 2001, this Court issued a show cause order instructing the parties to brief the issue of this Court's diversity jurisdiction in light of the Memorandum Opinion and Order issued by Judge Dan Aaron Polster in Kormanek v. St. Paul Fire and Marine Ins. Co., slip op., case no. 01-CV-2122 (October 19, 2001)(Dkt. #15). On November 20, 2001, Plaintiff filed her brief asserting that this Court has diversity jurisdiction over this action (Dkt. #66). On November 30, 2001, Defendants filed a two-page brief adopting the reasoning set forth in Plaintiff's brief.

"Unlike other issues not involving the merits of a case, subject-matter jurisdiction may be raised at any time, by any

party or even *sua sponte* by the court itself." Franzel v. Kerr Mfg. Co., 959 F.2d 628, 630 (6th Cir. 1992); *See* Fed. R. Civ. P. 12(h)(3) ("[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). Indeed, the issue of whether diversity jurisdiction exists maybe raised *sua sponte* by a court of appeals, after a trial court has already entered judgment. *See* Ford Motor Co. v. Insurance Co. v. N. Am., 669 F.2d 421, 423 (6th Cir. 1982) ("[t]his court raised the jurisdiction issue *sua sponte* at oral argument").

The present action arises out of a motor vehicle accident which occurred on October 25, 1992, in Summit County, Ohio. Jason Monahan ("Monahan") was a passenger in a rented limousine returning home from a high school dance. The limousine was struck by an uninsured driver and Monahan died as a result of the injuries he sustained the accident.

Plaintiff, the administratrix of Monahan's estate, filed a lawsuit against the uninsured driver, the limousine company, and the limousine driver. On October 19, 1999, a jury found in favor of the Plaintiff and against the uninsured driver in the amount of six million dollars ($6,000,000) in compensatory damages and two million dollars ($2,000,000) in punitive damages.

At the time of the accident, Monahan resided with Plaintiff and his step-father[2] and was employed by Exchange Printing ("Exchange"). Exchange had, in effect, two American States Insurance commercial liability policies: an Economy Package Policy (American Economy policy number 02-CC-

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[2] Plaintiff collected thirty thousand dollars ($30,000) from a family UM/UIM insurance policy.

147652 ("the Economy policy")), and a Super-Shield Umbrella Liability Policy (American States policy number 01-SU-080373 ("the Umbrella Policy" or, collectively, "the Exchange policies")).

Each Exchange policy included a form which undertook to offer uninsured/underinsured ("UM/UIM") coverage. The forms reflect that Exchange selected twenty-five thousand dollars ($25,000) in UM/UIM coverage under the Economy policy, and rejected UM/UIM coverage entirely under the Umbrella policy.

On May 10, 2000, Plaintiff filed the present action against Defendants, American States Insurance Company and American Economy Insurance Company[3], alleging that Monahan is entitled to UM coverage under the Exchange policies. Plaintiff contends that Monohan is an "insured" under his employer's commercial policies pursuant to the Supreme Court of Ohio's mandate in Scott-Pontzer v. Liberty Mut. Fire Ins. Co., 85 Ohio St.3d 660 (1999). Jurisdiction in this matter was predicated upon complete diversity of the parties.

In Kormanik, the Court analyzed 28 U.S.C. § 1332(c)(1), which addresses this Court's diversity jurisdiction in certain cases involving insurance companies. Specifically the statute states:

> In any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant,

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[3] Safeco, a third defendant, was voluntarily dismissed with prejudice on March 22, 2001 (Dkt/ #50)

> such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as any state by which the insurer has been incorporated and of the State where it has its principle place of business.

The immediate purpose of the 1964 amendment to s 1332(c) was made clear in the legislative history. Louisiana and Wisconsin had enacted laws permitting one claiming injury at the hands of another who was covered by liability insurance to sue the liability insurance carrier rather than the alleged wrongdoer. Thus even where the plaintiff and the alleged tortfeasor were residents of the same state, if the liability insurer was a citizen of a different state, diversity jurisdiction could be asserted in such a direct action. The Louisiana act particularly resulted in a flood of essentially local lawsuits clogging already crowded district court dockets. By cloaking the nonresident insurer with the citizenship of its insured, Congress removed the basis of diversity jurisdiction. *See* S.Rep. No.1308, reprinted in (1964) U.S.Code Cong.&Admin.News 2778-80; Henderson v. Selective Ins. Co., 369 F.2d 143, 149 (6th Cir. 1966); White v. United States Fidelity & Guaranty Co., 356 F.2d 746, 747-48 (1st Cir. 1966).

Most courts which dealt with the 1964 amendment in the years immediately following its enactment tended to limit its application narrowly. *E.g.*, Henderson, *supra*; White, *supra*; Inman v. MFA Mutual Ins. Co., 264 F.Supp. 727 (E.D.Ark. 1967); Walker v. Firemans Fund Ins. Co., 260 F.Supp. 95 (D. Mont.1966); Carvin v. Standard Accident Ins. Co., 253 F.Supp. 232 (E.D.Tenn. 1966); *aff'd on merits without discussion of jurisdiction*, 395 F.2d 326 (6th Cir. 1968); Twin City Fire Ins. Co. v. Wilkerson, 247 F.Supp. 766 (E.D. Tenn.1965). The opinions in most of these cases stressed the specific purpose of the 1964 amendment and then concluded either that the

insurance involved was not "liability insurance" or that the action was not a "direct action" within the meaning of s 1332(c).

The Sixth Circuit Court of Appeals, on the other hand, concluded that "if [the statute's] language encompasses other situations, we should not limit application of the [diversity-limiting provision] to th e specific conditions which gave it birth." Id. at 425. The Sixth Circuit, examining the statute's language, held that "Congress, when it used the terms 'direct action' and 'liability insurance' in . . . §1332(c), did not intend the [language] to apply only to traditional tort claims." Ford Motor Co. v. Insurance Co. of N. Am., 669 F.2d 421, 424 (6th Cir. 1982)(*Quoting* Aetna Cas. & Surety Ins. Co. v. Greene, 606 F.2d 123, 126 (6th Cir. 1979)).

The Sixth Circuit reasoned that if state law "permit[s] one claiming injury at the hands of another who was covered by liability insurance to sue the liability insurer rather than the alleged wrongdoer," §1332(c)(1) adds the requirement of diversity of jurisdiction between the tortfeasor and the injured plaintiff – even though the tortfeasor is not a party. Ford Motor Co., 669 F.2d at 424. "By cloaking the nonresident insurer with the citizenship of its insured, Congress removed the basis of diversity jurisdiction." Id. In Kormanik, Judge Polster concluded that §1332(c)(1) applies to Scott-Pontzer cases, so that, when an employee sues his employer's insurance company for UM/UIM coverage, the defendant insurance company must be deemed a resident of the same state as the employer-insured.[4]

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[4] Both Chief Judge Paul R. Matia and Judge Kathleen M. O'Malley adopted the reasoning of Kormanik and remanded Scott-Pontzer cases for lack of diversity jurisdiction. *See* Kohus v. Hartford Ins. Co., slip op., case no. 01-CV-1179 (Nov. 19, 2001)(Dkt. #21); Comella v. St. Paul Mercury Ins. Co., slip op.,

Plaintiff appears to concede that the above-captioned matter is a "direct action", as that term has been defined by the case law which has developed following the enactment of § 1132. Plaintiff instead cites a number of cases which stand for the proposition that §1332(c) does not apply to actions by insureds against their own insurers, under the uninsured motorist provisions of their liability insurance policies. *See*, Fortson v. St. Paul Fire and Marine Ins. Co., 751 F.2d 1157, 1159, (11th Cir.1985); McGlinchey v. Hartford Accident and Indemnity Co., 866 F.2d 651 (3rd Cir. 1989); Rosa v. Allstate Ins. Co., 981 F.2d 669, 674 (2nd Cir.1992); White v. United States Fidelity & Guar. Co., 356 F.2d 746, 747 (1st Cir.1996).

However, it is the opinion of this court that the insurance relationship created by Scott-Pontzer is distinguishable from the typical UM/UIM relationship, that is, where a plaintiff sues his own insurer pursuant to a contract. Here, there is no contract of insurance between Monohan and the insurer defendants. Rather, Plaintiff brings suit based upon state statute, as interpreted by the Ohio Supreme Court in Scott-Pontzer, which "permits a person claiming injury or damage arising from the ownership or use of a motor vehicle to sue [his employer's] insurer rather than the owner or operator of the vehicle." *See* Ford, 669 F.2d at 425.

This statutory interpretation, like the no-fault statute examined in Ford, "represents a latter-day attempt by the state[] to improve the mechanism for recovery by those injured and damaged in accidents arising out of the use of motor vehicles." Id. at 425-26. In particular, the Ohio Supreme Court's statutory interpretation creates insurance coverage by operation of law, even though this "result . . . was not intended by the parties to

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case no. 00-CV-2664 (December 11, 2001)(Dkt. #100).

the insurance contracts at issue." Scott-Pontzer, 710 N.E.2d at 1120-21. In both the instant case and in Ford, state law allows a plaintiff to sue directly an otherwise unobligated insurer to recover the tortfeasor's liability. And, as in Ford, "[u]nless the proviso is held to apply, the same 'back door diversity' which Congress eliminated by the 1964 amendment [to §1332] would be possible" in Scott-Pontzer cases. Ford, 669 F.2d at 425.

Plaintiff further contends that because the insured in this case is not the tortfeasor, but, rather, Monohan's employer, the insurance policies at issue are not "liability policies." However, this Court is persuaded by the language of the Sixth Circuit in Ford, wherein the Court stated that, "Congress did not intend the [language of § 1332(c)] to apply only to traditional tort claims." Ford, 669 F.2d at 424. Moreover, as in Ford, it is an artifact of state law in the case *sub judice* that permits Plaintiff to name an insurance company as a defendant, without naming the tortfeasor as a party, and to recover damages caused by the absent tortfeasor.

In both this case and Ford Motor Co., state law makes insurance benefits available to an injured party "[other] than on the basis of traditional tort liability, and actions to secure the[se] benefits may be maintained directly against the insurer of the vehicle rather than the insured." Id. at 425. The factual circumstances of this case may be different from those of Ford Motor Co., but the logic leading to the application of § 1332(c)(1) is the same.

As Judge Polster noted in Kormanik, the Ohio Supreme Court's ruling in Scott-Pontzer has "resulted in a burgeoning number of cases that would not otherwise have fallen within the diversity jurisdiction of the federal courts." Slip op. at 4. Thus, "the same policy reasons that prompted the addition of the diversity restricting provision to § 1332(c) in the first place

apply with equal force to Scott-Pontzer actions." Id. Congress enacted §1332(c)(1) to ensure that this Court's limited diversity jurisdiction would not be expanded by state law, and, consequently, it is this jurisdiction-guarding "policy" that this Court enforces in the case *sub judice*.

In conclusion, it is the opinion of this Court that complete diversity of citizenship did not exist between the parties when this case was filed. Consequently, this matter is **DISMISSED** for lack of subject matter jurisdiction.

IT IS SO ORDERED.

s/ Peter C. Economus 12/20/01
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01CV1179

RONALD KOHUS

Plaintiff

v.

HARTFORD INSURANCE COMPANY

Defendant

JUDGE: PAUL R. MATIA

ORDER OF REMAND

Pursuant to this Court's Memorandum of Opinion and Order filed contemporaneously with this Order of Remand,

It is ordered that the plaintiffs' motion to remand is granted. This action is hereby remanded to the Court of Common Pleas of Cuyahoga County, Ohio.

IT IS SO ORDERED.

/s/ Paul R. Matia
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

A copy of the foregoing Order of Remand was filed electronically this 19th day of November, 2001. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Paul R. Matia
JUDGE PAUL R. MATIA

CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01CV1179

RONALD KOHUS

Plaintiff

v.

HARTFORD INSURANCE COMPANY

Defendant

JUDGE: PAUL R. MATIA

MEMORANDUM OF OPINION
AND ORDER

On March 7, 1987, the plaintiff, Ronald Kohus, was severely injured while a passenger in a motor vehicle operated by an uninsured motorist. An uninsured motorist claim was pursued against his insurance carrier, Allstate Insurance Company, which paid him the policy limits but did not adequately compensate him for his injuries. At that time, plaintiff was employed by Plainville Ready Mix Concrete, Inc. who was insured under a commercial general liability insurance policy with defendant Hartford Insurance Company (Hartford). The plaintiff alleges in his complaint that this insurance policy included underinsured motorist coverage, or if not, said coverage arises by operation of law. Plaintiff seeks to recover under his former employer's insurance policy pursuant to the Ohio Supreme Court's decision in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660 (1999). The action, originally

filed in the Common Pleas Court of Cuyahoga County, Ohio was removed by defendant in accordance with 28 U.S.C. § 1441(a) on the basis of diversity of citizenship, 28 U.S.C. § 1332(c). This matter is before the Court upon the plaintiff's motion to remand on the ground that complete diversity of citizenship does not exist as the plaintiff and defendant are both citizens of Ohio. (ECF 16). Along with the brief attached to this motion, the Court has reviewed the defendant's memorandum in opposition to the plaintiff's motion to remand to state court. (ECF 20). For the following reason, the plaintiff's motion to remand is granted.

A corporation is a citizen of any state where it has been incorporated and the state where it has its principal place of business. 28 U.S.C. § 1332(c). In the present case defendant Hartford is incorporated and has its principal place of business in Connecticut. In 1964, 28 U.S.C. § 1332(c) was amended as follows:

> [I]n any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insurer is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business;

If this case is considered a direct action against Hartford it will be a citizen of both Connecticut and Ohio because Hartford's insured, Plainville Ready Mix Concrete, Inc, is an Ohio corporation with its principal place of business in Ohio. Thus, diversity will be lacking.

This provision was added because the States of Louisiana and Wisconsin enacted statues allowing suits directly against insurance companies without joining the tortfeasors resulting in an increase in diversity cases. *Henderson v. Selective Ins. Co.*, 369 F.2d 143, 149 (6th Cir. 1966). The Sixth Circuit defines "direct action" as "an action that under applicable state law may be brought directly against the insurer by the tort claimant prior to entry of judgment against the alleged tortfeasor." *Stockton v. General Acc. Ins. Co.*, 897 F.2d 530, 1990 WL 20477 at * 3 (6th Cir.). *Stockton* involved a garnishment lawsuit brought by judgment creditors against an insurer that the Sixth Circuit found was not a direct action under § 1332(c) because a valid judgment against the insured tortfeasor was a prerequisite to any action by the plaintiffs against the insurer. *Id.* at * 3.

Recently, United States District Judge Dan Aaron Polster granted a motion to remand in *Kormanik v. St Paul Insurance and Marine Co.*, Case No. 4:01CV2122 (N.D. Ohio 2001) (unreported), on the ground that the court lacked subject matter jurisdiction based on § 1332(c). Judge Polster relied on the reasoning in *Henderson v. Selective Ins. Co.* wherein the Sixth Circuit recognized that § 1332(c) was adopted in order to address the increasing burden faced by federal courts as a result of new state laws which created diversity actions. *Id.*, 369 F.2d at 149. The Sixth Circuit extended its reasoning in *Henderson* to actions directly against an insurer pursuant to Michigan's no-fault insurance law in *Ford Motor Co. v. Insurance Company of North America*, 669 F.2d 421 (6th Cir. 1982). The court opined that the provision of § 1332(c) should not be limited to the specific conditions that arose with the new Louisiana and Wisconsin laws. *Id.* at 425. Because of Congress's reaction to the earlier state legislation, no-fault insurance should not be held to expand the jurisdiction of federal courts. *Id.* at 426.

The *Scott-Pontzer* case has resulted in an escalation of cases filed in this Court that would otherwise not have been filed here, the same reaction that occurred in connection with the Louisiana and Wisconsin legislation. As Judge Polster recognized, *Scott-Pontzer* has caused unsettled questions of law to arise that require the district courts to attempt to guess how the Ohio Supreme Court would rule in certain situations.[5] It would be better for the state courts to address these issues. The same reasons that motivated the enactment of 28 U.S.C. § 1332(c) also apply to *Scott-Pontzer* type actions.

Further, this action satisfies the Sixth Circuit definition of direct action. It is a direct action against an insurer of a company that was not involved in plaintiff's accident. *Scott-Pontzer* type actions do not require a prior entry of judgment against a tortfeasor. *See Kormanik v. St. Paul Fire and marine Insurance Co.*, at P. 5. The Court concludes that this is a direct action depriving it of subject matter jurisdiction pursuant to 28 U.S.C. § 1332(c).

Accordingly, for the foregoing reason, the plaintiff's motion to remand (ECF 16) is granted.

IT IS SO ORDERED.

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[5] For example, Ohio law is not settled as to whether limitations or conditions precedent in an insurance policy apply when insurance coverage is imposed by law. See *Myers v. Safeco Ins. Co.*, 2000 WL 329800 (Ohio App., 5th Dist.), *rev'd*, 91 Ohio St.3d 333 (2001) (reversal based on *Davidson v. Motorists Mut. Ins. Co.*, 91 Ohio St.3d 262, 264 (2001)); *Luckenbill ex rel Luckenbill v. Midwestern Indemnity Co.*, 2001 WL 585730 (Ohio App., 2nd Dist.)

/s/ Paul R. Matia
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum of Opinion and Order was filed electronically this 19th day of November, 2001. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Paul R. Matia
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:01CV2138

NAOMI GOODEN, et al.,

Plaintiffs,

v.

NATIONAL UNION FIRE INS. CO., et al.,

Defendants.

JUDGE: DAN AARON POLSTER

ORDER

On October 24, 2001, this Court ordered Defendants to show cause within ten days why this case should not be remanded for lack of subject matter jurisdiction. (ECF No. 16). On November 13, 2001, Defendants filed a memorandum in response to the Order. (ECF No. 19). Having reviewed Defendants' memorandum, the Court finds that diversity of citizenship exists because the Defendants' insured, the Motor Wheel Corporation, is a citizen of Michigan. Accordingly, the Court finds that it has subject matter jurisdiction over the case.

IT IS SO ORDERED.

S/Dan Aaron Polster 11/14/01
Dan Aaron Polster
United States District Judge

APPENDIX K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01cv0851

GREGORY H. ROGERS,

Plaintiff,
v.

BRUCE JEFFREY KOHLER, II, et al.,

Defendants.

JUDGE: O'MALLEY

MEMORANDUM & ORDER

In this action, plaintiff Gregory Rogers sues defendants Bruce Kohler II and Chubb Group of Insurance Companies (Chubb"). Rogers alleges he was injured while riding as a passenger on a motorcycle driven by Kohler. Rogers further alleges that Chubb issued a commercial business automobile insurance policy to his employer, Shoney's, Inc. Rogers states a number of claims, on one of which is that he is an insured under the Chubb policy's underinsured motorists ("UIM") coverage, pursuant to Scott-Pontzer v. Liberty Mut. Fire Ins. Co 85 Ohio St.3d 660 (Ohio 1999). The parties have filed cross-motions for summary judgment.

In the summary judgment motions, however, the parties

did not address the propriety of removal jurisdiction. Rogers originally filed this action in the Cuyahoga County, Ohio Court of Common Pleas. Defendants then removed the action to this Court, based on diversity of jurisdiction: Rogers is a resident of Ohio, Kohler is a resident of North Carolina, and Chubb is a resident of New Jersey and Indiana. Thus, the defendants asserted that removal was proper based on diversity jurisdiction.

As this Court has recently noted, however, 28 U.S.C. §1332(c)(1) applies to cases permitted by Scott-Pontzer. Kormanik v. St. Paul Fire and Marine Ins. Co., Case No. 5:01CV 02122, slip op. (Polster, J.). In pertinent part, this statute states that, "in any direct action against the insurer of a policy or contract of liability insurance . . . to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of businsess." Thus, Chubb must also be deemed a resident of those states where its named insured, Shoney's, resides. The record does not reveal where Shoney's resides, but legal research suggests Shoney's is a resident of Tennessee. Booty v. Shoney's Inc., 872 F. Supp. 1524, 1528-29 (E.D. La. 1995).

In addition, the Ohio Supreme Court ruled in Scott-Pontzer that a corporation's employees, even thought they were not a "named insured," were still "insureds" entitled to UIM coverage under a commercial automobile liability policy designating the corporation as the named insured. In other words, for purposes of his Scott-Pontzer UIM claim against Chubb, Rogers is an "insured" of Chubb; thus, pursuant to 28 U.S.C. §1332(c)(1), it appears that Chubb may be deemed a resident of Ohio, Rogers' state of residency. This circumstance, of course, would defeat diversity jurisdiction.

Accordingly, the Court **ORDERS** defendants to **SHOW CAUSE** why this action should not be remanded to state court, for lack of jurisdiction. Defendants shall file a show-cause brief on the date 14 calendar days after the date of this Order, and plaintiff may file a response brief 21 calendar days after the date of this Order. If defendants fail to file a show-cause brief, the Court will remand this action.

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01CV1063

Douglas Johnson, et al.,

Plaintiffs,

v.

Fireman's Fund Insurance Co., et al.

Defendants.

JUDGE: DONALD C. NUGENT
Dated January 15, 2002

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Motion of Plaintiffs Douglas and LeeAnn Johnson to Remand the action to the Court of Common Pleas for Cuyahoga County. (ECF#12). Plaintiffs contend that this Court lacks subject matter jurisdiction because diversity of citizenship does not exist between the parties. For the reasons that follow, Plaintiffs' Motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, who are Ohio residents, filed this action in the Court of Common Pleas of Cuyahoga County. Defendant Fireman's Fund Insurance Company ("Fireman's Fund") is a

California company with its principal place of business in California. Defendant removed the action to this Court based upon diversity jurisdiction.

In their Complaint, Plaintiffs allege that Mrs. Johnson was involved in an automobile accident, caused by Rhonda Janey, in which she sustained serious and permanent injuries. The Complaint alleges that Ms. Janey's insurance company, State Farm Insurance Company, has offered is policy limits of $50,000. Since Mrs. Johnson's injuries are alleged to far exceed $50,000, Ms. Janey was underinsured.

At the time of the accident, Mr. Johnson was employed by Modern Tool & Die Corporation. ("MTD"). MTD is an Ohio company with its principal place of business in Ohio. At all pertinent times, MTD was insured under a commercial general liability policy issued by Defendant Fireman's Fund. Plaintiffs seek a declaration that Plaintiffs are entitled to uninsured/underinsured (UM/UIM) motorist coverage under MTD's Fireman's Fund general liability policy in accordance with the holding of the Ohio Supreme Court in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 710 N.E.2d 116 (Ohio 1999) and its progeny. *Scott-Pontzer* and its progeny hold that unless an insured business and its insurer agree otherwise, and their agreement meets specific requirements, UM/UIM motorist coverage automatically exists in favor of the insured business by operation of law, and the business insured's employees also automatically receive this UM/UIM motorist coverage.

In their motion to remand, Plaintiffs assert that diversity does not exist pursuant to 28 U.S.C. § 1332(c)(1) which provides:

> In any direct action against the insurer of a policy or contract of liability insurance, whether

> incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as any State by which the insurer has been incorporated and of the State where it has its principle place of business.

Recent decisions by Judge Daniel A. Polster, Chief Judge Paul R. Matia and Judge Kathleen O'Malley have examined § 1332(c)(1) and have concluded that in *Scott-Pontzer* cases (where an employee or an employee's family member sues his employer's insurance company for UM/UIM coverage) the insurance company must be deemed a resident of the same state as the employer-insured. *Kormanik v. St. Paul Fire and Marine Ins. Co.*, slip op. at 2-6, case no. 5:01 CV 2122 (Oct. 19, 2001); *Kohus v. Hartford Ins. Co.*, slip op. at 2-5, case no. 1:01 CV 1179 (Nov. 19, 2001); *Comella v. St. Paul Mercury Ins. Co.*, slip op. at 4-9, case no. 1:00 CV 2664 (Dec. 11, 2001). However, Judge Ann Aldrich, Judge Patricia A. Gaughan and Judge Leslie Brooks Wells have determined that these *Scott-Pontzer* cases are not "direct actions" within the meaning of § 1332 (c)(1) and thus, the diversity limiting provision of § 1332 (c)(1) does not apply. *Redmon v. Sumitomo Marine Management (USA), Inc.*, slip op. at 2-8, case no. 1:01 CV 397 (Oct. 30, 2001); *Fidelity and Guaranty Ins. Underwriters, Inc. v. Nocero*, slip op. at 11-17 (Dec. 13, 2001); *Bliss v. Nat. Union Fire Ins. Co. of Pittsburgh, Pa.*, slip op. at 1-2 (Nov. 1, 2001).

If the diversity limiting provision of § 1332 (c)(1) applies in this instance, Fireman's Fund would be deemed a citizen of the same state as MTD and Plaintiffs, which is Ohio, and diversity jurisdiction would not exist. Conversely, if this action is not a direct action within the meaning of § 1332 (c)(1),

then the parties are diverse and this Court has jurisdiction.[6]

Plaintiff's Motion for Remand (ECF #12) is fully briefed and ready for decision.

DISCUSSION

The only issue before the Court is whether this lawsuit constitutes a "direct action" as that phrase is defined in § 1332 (c)(1). Section 1332 (c)(1) provides that "[i]n any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen ...". A majority of courts that have attempted to define "direct action" for the purposes of § 1332(c)(1) have determined that a direct action is

> one 'in which a party suffering injuries or damage for which another is legally responsible is entitled to bring suit against the other's liability insurance without joining the insured or first obtaining a judgment against him.' *Beckham v. Safeco Ins. Co. of America*, 691 F.2d 898, 901-02 (9th Cir. 1982). In other words, this direct action exception that destroys diversity exists only where a third-party tort victim forgoes suing the tortfeasor in favor of instead of

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[6] While Plaintiffs have filed their Motion to Remand several months after the action was removed to this Court, the motion is timely in that remand on the basis of lack of subject matter jurisdiction is required if the jurisdictional failure appears "any time before final judgment." 28 U.S.C. § 1447(c).

> suing the tortfeasor in favor of instead suing the tortfeasor's liability insurer directly. This is the universal rule. *See, e.g., Myers v. State Farm Ins. Co.*, 842 F.2d 705, 707 (3d Cir. 1988); *Fortston v. St. Paul Fire & Marine Ins. Co.*, 751 F.2d 1157, 1159 (11th Cir. 1985), *reh. denied*, 757 F.2d 287; *White v. United States Fidelity and Guarantee Co.*, 356 F.2d 746, 747-48 (1st Cir. 1966).

Vargas v. California State Auto. Ass'n Inter-Ins. Bureau, 788 F. Supp. 462, 463 (D. Nev. 1992).

Plaintiffs assert that this is a direct action because the insured is not joined as a party defendant. Despite this assertion, Plaintiffs are claiming to be insureds under Mr. Johnson's employer's general liability policy. The defendant insurance company disputes that Plaintiffs have any coverage under MTD's policy. Neither MTD nor Fireman's Fund has any connection to or bears any liability for the tortfeasor Ms. Janey. Rather, the only issue between Plaintiffs and Fireman's Fund is a coverage dispute between a potential insured and their insurance company. Review of the language of § 1332(c), as well as its legislative history and judicial decisions interpreting the section, lead the Court to the firm conclusion that the "insured" referred to in § 1332(c) is the tortfeasor not the tort claimant/plaintiff.

Congress adopted § 1332(c) in 1964 in response to a "direct action" statute which had been enacted in Louisiana which permitted tort claimants to bring a direct action against the tortfeasor's liability insurer without first obtaining judgment against the tortfeasor. As the legislative history of § 1332(c) makes clear, the purpose of § 1332(c) was to overcome the Louisiana direct action statute which allowed plaintiffs to file

suit against the tortfeasor's out of state liability insurer without joining the in-stated diversity destroying tortfeasor in federal court thus avoiding the Louisiana rule of State Courts under which appellate courts were not bound by the factual findings of a jury but could review the judgments of the lower courts on questions of fact and law. The Louisiana direct action statute caused large numbers of cases, that otherwise would have been filed in state courts, to be filed in the federal courts of that state. Senate Report No. 1308, reprinted in, 1964 U.S. Code Cong. & Admin. News 2778, 2785.

Thus, § 1332(c) applies where a tortfeasor's insurer is sued directly by the tort claimant in an action in which the tortfeasor-insured is not joined as a defendant. In those situations Congress determined that the tortfeasor's insurer should stand in the shoes of the tortfeasor and be deemed to have the same citizenship as the tortfeasor-insured. This was succinctly explained by the court in *Spooner v. Paul Revere Life Ins. Co.*, 578 F. Supp. 369, 373 (E.D. Mich. 1984) as follows:

> The application of [§ 1332(c)] to an insurance company in the typical tort action is proper because the tortfeasor has purchased the policy as protection against liability arising from his breach of duty owed to the injured party. The typical action is such that the act for which liability is sought to be imposed against the insurance company is the same act for which liability could be imposed against the insured. In this sense, the insurance company derives its liability from the insured. With the 1964 amendment [to § 1332], Congress intended that the insurer derive its citizenship from the insured as well.

Congress' purpose is not served in cases like this where the plaintiff is the tort claimant and is also claiming to be the insured. In this situation the insured is suing his own insurer.[7] The insurer has no connection to the tortfeasor and is not standing in the tortfeasor's shoes. Accordingly, § 1332(c) is inapplicable. *See Rosa v. Allstate Ins. Co.*, 981 F.2d 669, 678 n. 18 (2d Cir. 1992) ("Because the § 1332(c) proviso is designed to address cases in which an insured may be, but is not, joined as a party-defendant, it would be inappropriate for the proviso to affect situations where a person characterizable [sic] as an insured party sues the insurer, since a plaintiff obviously cannot join herself as a party-defendant."); *Bowers v. Continental Ins. Co.*, 753 F.2d 1574, 1576 (11th Cir. 1985)("The general rule has always been that the direct action proviso does not affect suits brought by an insured against his own insurer."); *White v. United States Fid. & Guar. Co.*, 356 F.2d 746, 747-48 (1st Cir. 1966)(suit by insured against insurer is not direct action within the meaning of § 1332(c).); *Kimball Small Props. v. Am. Nat'l Fire Ins.*, 755 F. Supp. 1465 (N.D. Cal. 1991)(same); *Field v. Liberty Mut. Ins. Co.*, 769 F. Supp. 1135, 1138 (D. Haw. 1991)(same); *McGlinchey v. Hartford Accident and Indem. Co.*, 666 F. Supp. 70, 71 (E.D. Pa. 1987 (same); *Smith v. State farm*

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[7] Some of the decisions which have found that *Scott-Pontzer* suits constitute direction actions within the meaning of § 1332(c) have distinguished the cases herein which have held that actions by insureds against their insurers are not direct actions on the ground that the plaintiff, while claiming to be entitled to UM/UIM benefits under his employer's policy, is not a party to the insurance contract and thus is not the insured. *See Comella*, slip op. at 7 n.3. This Court respectfully disagrees. One of the material allegations in the *Scott-Pontzer* claims is that the injured plaintiff is an insured (albeit by operation of law) under his or her employer's policy. The fact that the plaintiff is not a party to the insurance policy does not prohibit him from being an insured.

Ins. Co., 615 F. Supp. 453, 455 (D. Haw 1985 (same); *Bishop v. Allstate Ins. Co.*, 313 F. Supp. 875, 876 (W.D. Ark. 1970); *Adams v. State Farm Mut. Automobile Ins. Co.*, 313 F. Supp. 1349, 1352 (N.D. Miss. 1970); *USAA Cas. Ins. Co. v. Suzanne*, 1988 US Dist LEXIS 17883 at *2-3 (E.D. Mich. Aug. 2, 1988)("In the typical situation contemplated under § 1332(c), the injured party would bring a direct action against the tortfeasor's insurer for recovery of benefits. Thus, the insurance company would have the rights of its insured, the tortfeasor. However, the situation here is different since the injured person is suing his own insurer for uninsured motorist benefits and not for "no fault" benefits. The insurance company is acting on its own behalf against its insured. Thus diversity is proper....").

The Sixth Circuit has not interpreted § 1332(c) in such a manner as to require a finding that these *Scott-Pontzer* cases are direct actions. In *Ford Motor Co. v. Ins. Co. of North America*, 669 F.2d 421, 422 (6th Cir. 1982), the court held that § 1332(c) destroyed diversity where an injured party sues the tortfeasor's insurer under Michigan's no-fault statute and the plaintiff and the insured, though not a party, are citizens of the same state. The court determined that

> no-fault insurance operates in exactly the same way as the Louisiana and Wisconsin direct action statutes-it permits a person claiming injury or damage arising from the ownership or use of a motor vehicle to sue the insurer rather than the owner or operator of the vehicle. Unless the proviso is held to apply, the same "back door diversity" which Congress eliminated by the 1964 amendment would be possible under no-fault. No-fault represents a latter-day attempt by the states to improve the mechanism for recovery by those injured and

> damaged in accidents arising out of the use of motor vehicles. Given Congress' reaction to earlier state legislation which permitted direct actions, no-fault should not be held to expand the jurisdiction of federal courts. Where, by making the insurer the defendant a plaintiff creates an apparent diversity which would not exist if the owner or operator of an insured vehicle were a named defendant, § 1332(c) operates to deny jurisdiction by attributing the citizenship of the insured to the insurer.

Id. at 425-426. While other circuits have determined that the direct action proviso of § 1332(c) does not apply to no-fault insurance claims, *See Rosa*, 981 F.2d at 678-79; *Bowers*, 753 F.2d at 1576, the Sixth Circuit's holdings in *Ford Motor Co.* does not require a finding that the direct action proviso also applies to UM/UIM coverage in *Scott-Pontzer* type cases. In *Ford Motor Co.*, the injured claimant brought suit directly against the tortfeasor's insurer-not his own insurer. Accordingly, the rationale behind the Court's decision in *Ford Motor Co.* is inapplicable to this case.[8]

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[8] While the Court agrees with the findings of Judge O'Malley, Judge Polster and Judge Matia that Ohio law, by virtue of *Scott-Pontzer* and its progeny, has resulted in an escalation of cases filed in this Court that would otherwise not have been filed here and that these cases require the Court to attempt to guess how the Ohio Supreme court will rule in certain situations, those facts do not make these cases "direct actions". The Louisiana statute and the Michigan no-fault statute both permitted injured persons to file direct actions against the tortfeasor's insurer without joining the tortfeasor or obtaining a judgment against him. In both cases the insurer stands in the shoes of the tortfeasor and is thus deemed to be a citizen of the same state as the tortfeasor. In *Scott-Pontzer*

Similarly, in the unreported case of *Stockton v. General Accident Ins. Co.*, 897 F. 2d 530, 1990 WL 20477 (Mar. 6, 1990), the Sixth Circuit determined that the direct action proviso of § 1332(c) did not apply to an injured plaintiff's creditor's action against his tortfeasor's insurer. The court stated that "[t]he general understanding in this circuit has been that the term "direct action," as used in the [§ 1332(c)] proviso, means an action that under applicable state law may be brought directly against the insurer by the tort claimant prior to entry of any judgment against the alleged tortfeasor." *Id.* at *3-4. Because a valid judgment against the tortfeasor was a prerequisite to any action by the plaintiffs against the tortfeasor's insurer General Accident, § 1332 (c) was inapplicable. *Id.* at *4. Plaintiffs' argument that they meet this definition of direct action because *Scott-Pontzer* actions do not require prior entry of a judgment against the tortfeasor, *see Kormanick*, slip op. at 5 n. 1, ignores that fact that the insured in *Stockton* was the tortfeasor.

Direct actions within the context of § 1332(c) exist only when an injured party is permitted to sue the tortfeasor's insurer directly, without joining the tortfeasor or obtaining a judgment against the tortfeasor. *Scott-Pontzer* actions, including the one at bar, do not meet this definition. Accordingly, the diversity limiting proviso of § 1332(c)(1) is not applicable.

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cases the insurer is not the tortfeasor's liability insurer and in fact has no connection whatsoever to the tortfeasor.

CONCLUSION

For the reasons stated herein, Plaintiffs' *Scott-Pontzer* claim is not a direct action within the meaning of § 1332 (c)(1). Accordingly, Plaintiffs' Motion for Remand (ECF#12) is DENIED.

IT IS SO ORDERED.

s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: January 15, 2002

APPENDIX M

[Filed Dec.13, 2001, PM 4:20]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01 CV 397

Fidelity and Guaranty Insurance
Underwriters, Inc.,

Plaintiff,

v.

Patricia Nocero, Administrator of the
Estate of Bernadette Hutchins,

Defendant.

JUDGE PATRICIA A. GAUGHAN

MEMORANDUM OF OPINION AND ORDER

This matter is before the Court upon Defendant's Motion to Remove Case to State Court, or in the Alternative, to Certify Any State Law Questions to the Ohio Supreme Court (Doc. 22). This cases arises out of the death of defendant's decedent in a motor vehicle accident. Plaintiff seeks a declaratory judgment regarding the rights and responsibilities of the parties with respect to uninsured/underinsured motorists (hereinafter "UM/UIM") coverage provided by plaintiff to the decedent's former employer. For the following reasons, the Motion is DENIED.

FACTS

For the purpose of ruling on defendant's Motion, the facts as set forth in the Complaint are assumed to be true.

On June 11, 2000 Bernadette Hutchins was killed while riding as a passenger on a motorcycle owned by Jessica D. Steinbach and operated by Michael D. McElroy when it was struck by a vehicle operated by Damian Square. (Compl. ¶ 2). Defendant Patricia Nocero is the Administrator of the Estate of Bernadette Hutchins. (Compl. ¶ 3).

According to defendant, Hutchins was an employee of Medallion Lighting Corporation & Western Reserve Lamp Works & Rentalight (hereinafter "Medallion") at the time of the accident. (Compl. ¶ 3). Defendant has made a claim for UM/UIM coverage under Medallion's Business Auto Policy No. BFA00000613373, which was issued by plaintiff Fidelity and Guaranty Insurance Underwriters, Inc. effective May 19, 2000 through May 19, 2001. (Compl. ¶¶ 1, 3). Defendant's claim for UM/UIM coverage is based on *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.*, 710 N.E.2d 1110 (Ohio 1999).[9]

Plaintiff seeks a declaration that its Policy does not provide UM/UIM coverage with respect to the accident involved in this case based on its claim that the terms of its Policy are "markedly different" than those interpreted in *Scott-Pontzer* (Compl. ¶ 4).

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[9] In *Scott-Pontzer*, the Ohio Supreme Court held that a corporation's employees were insureds entitled to UM/UIM coverage regardless of whether they were acting within the scope of their employment at the time of the accident in question.

Plaintiff bases jurisdiction on diversity of citizenship. (Compl. ¶ 8). Plaintiff is a Wisconsin corporation engaged in the insurance business with its principal place of business located in Wisconsin. (Compl. ¶ 6). Defendant is an individual who resides in Ohio.[10] (Compl. ¶ 7).

Defendant seeks to remove this case to the Lake County Court of Common Pleas or, in the alternative, to certify state law questions to the Ohio Supreme Court. Plaintiff opposes defendant's Motion.

STANDARD OF REVIEW

Defendant argues that removal from this Court to the Lake County Court of Common Pleas is proper pursuant to 28 U.S.C. §§ 1332(c)(1) and 1441. However, neither of these statutes provide a basis for the removal of a case originally filed in a federal court to a state court.[11] Therefore, defendant's Motion will be treated as one to dismiss for lack of subject matter jurisdiction.

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[10] The legal representative of the estate of a decedent is deemed a citizen of the same state as the decedent. 28 U.S.C. § 1332(c)(1). Although not averred to, defendant claims that Hutchins was a resident of Painesville Township, Ohio. Plaintiff does not dispute this fact. Thus, defendant is deemed to be a citizen of Ohio for the purpose of determining this Court's subject matter jurisdiction.

[11] 28 U.S.C. § 1441 sets forth the circumstances under which a civil action originally filed in a state court over which a federal court would have original jurisdiction may be removed by the defendant to the appropriate federal district court. 28 U.S.C. § 1332(c)(1), which is discussed in detail below, sets forth the requirements for federal diversity jurisdiction.

When a court's subject matter jurisdiction is challenged, the party seeking to invoke jurisdiction bears the burden of proof. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Rogers v. Stratton*, 798 F.2d 913, 915 (6th Cir. 1986). This burden is not onerous. *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996). The party need only show that the complaint alleges a substantial claim under federal law. *Id.*

A motion to dismiss for lack of subject matter jurisdiction may constitute either a facial attack or a factual attack. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). Facial attacks question the sufficiency of the jurisdictional allegations in the complaint. *Id.* Thus, those allegations must be taken as true and construed in the light most favorable to the nonmoving party. *Id.* Factual attacks, however, challenge the actual fact of the court's jurisdiction. *Id.* In such cases, the truthfulness of the complaint is not presumed. *McGee v. East Ohio Gas Co.*, 111 F.2d 979, 982 (S.D. Ohio 2000) (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320 (6th Cir. 1990)). Instead, the Court may weigh any evidence properly before it. *Morrison v. Circuit City Stores, Inc.*, 70 F.Supp.2d 815, 819 (S.D. Ohio 1999) (citing *Ohio Nat'l*, 922 F.2d 320; *Rogers*, 798 F.2d 913).

When presented with a facial attack, the non-moving party "can survive the motion by showing any arguable basis in law for the claim made." *Musson Theatrical*, 89 F.3d at 1248. Thus, such a motion will be granted only if, taking as true all facts alleged in the complaint, the Court is without subject matter jurisdiction to hear the claim. *Matteson v. Ohio State University*, 2000 WL 1456988 * 3 (S.D. Ohio Sept. 27, 2000).

DISCUSSION

Subject Matter Jurisdiction

Generally, in an action based on diversity of citizenship, a corporation is deemed to be a citizen of any state in which it is incorporated as well as of the state in which its principal place of business is located. 28 U.S.C. § 1332(c)(1). In certain cases, however, an exception to that rule exists:

> [I]n any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

Defendant's arguments are based on this exception, commonly referred to as the "direct action proviso."

Defendant claims and plaintiff does not dispute that Medallion is an Ohio corporation with its principal place of business in Mentor, Ohio. Medallion has not been made a party to this action. Thus, if this case involves a "direct action against the insurer of a policy or contract of liability insurance," plaintiff must be deemed a citizen of Ohio and this case dismissed for lack of subject matter jurisdiction.

Plaintiff argues that the direct action proviso is inapplicable to this case for three reasons: (1) this case does not involve a policy or contract of liability insurance; (2) this case does not involve an action against an insurer; and (3) this case

does not involve a "direct action" in the sense intended by the statute. In addition, plaintiff argues that the policy considerations raised by defendant are not relevant to a determination of whether subject matter jurisdiction based on diversity of citizenship exists.

Defendant claims that the plain language of § 1332(c)(1) establishes the lack of subject matter jurisdiction in this case. Defendant argues that the Sixth Circuit has interpreted the direct action proviso broadly enough to encompass this case. In addition, defendant argues that the purpose of the proviso is to relieve the federal courts of a flood of diversity cases in which an out-of-state insurer is sued directly and the insured is not joined as a defendant. According to defendant, the Ohio Supreme Court's decision in *Scott-Pontzer* threatens to create just such a flood. Defendant argues that insurers should not be permitted to circumvent the purpose of the direct action proviso merely by rushing to the federal courthouse before a claimant can file a complaint for damages in state court. Finally, defendant argues that public policy supports a finding of no subject matter jurisdiction. Defendant asserts that Ohio law regarding UM/UIM coverage is in a state of flux and redefinition which the Ohio state courts are in a better position to resolve. In addition, defendant argues that the Ohio state courts can more efficiently handle the large volume of *Scott-Pontzer* cases that have been and will be filed. Defendant requests that this Court abstain from exercising jurisdiction on the grounds that it would serve no useful purpose; rather, it would encroach on the ability of Ohio state courts to resolve issues in this uncertain area of law.

28 U.S.C. § 1332(c)(1)

As explained by the Supreme Court,

> Congress added the [direct action] proviso to § 1332(c) in 1964 in response to a sharp increase in the caseload of Federal District Courts in Louisiana resulting largely from that State's adoption of a direct action statute. The Louisiana statute permitted an injured party to sue the tortfeasor's insurer directly without joining the tortfeasor as a defendant. Its effect was to create diversity jurisdiction in cases in which both the tortfeasor and the injured party were residents of Louisiana, but the tortfeasor's insurer was considered a resident of another State. Believing that such suits did "not come within the spirit or the intent of the basic purpose of the diversity jurisdiction of the Federal judicial system," Congress enacted the proviso "to eliminate under the diversity jurisdiction of the U.S. district courts, suits on certain tort claims in which both parties are local residents, but which, under a State 'direct action' statute, may be brought directly against a foreign insurance carrier without joining the local tort-feasor as a defendant."

Northbrook Nat. Ins. Co. v. Brewer, 493 U.S. 6, 9-10 (1989) (citations omitted).

Defendant characterizes this case as "a direct action, based on a contract of insurance, brought by Plaintiff, Fidelity and Guaranty Insurance Underwriters, Inc." This characterization undermines defendant's own argument that the plain language of § 1332(c)(1) prohibits a finding of subject

matter jurisdiction in that, as noted above, the direct action proviso only applies to a "direct action **against** the insurer of a policy or contract of **liability** insurance." Defendant is correct that this Court must give effect to "the natural and plain meaning [of] statutes as passed by Congress." *National Life & Accident Ins. Co. v. United States*, 524 F.2d 559, 560 (6th Cir. 1975). However, the natural and plain meaning of the direct action proviso does not destroy diversity in this case.

First, a UM/UIM policy is not a "policy or contract of **liability** insurance." *Hernandez v. Travelers Ins. Co.*, 489 F.2d 721, 725 (5th Cir. 1974).

In *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123, 127 (6th Cir. 1979), the Sixth Circuit adopted the definition of liability insurance set forth by the court in *Vines v. United States Fidelity & Guaranty Co.*, 267 F.Supp. 436, 437-438 (E.D. Tenn. 1967):

> The term 'liability insurance' is applied to contracts which provide for indemnity against liability. Liability insurance is that form of insurance by which the insured is indemnified against loss or liability on account of bodily injuries sustained by others, or in a broader sense, against loss or liability on account of injuries to property. A policy of liability insurance is a policy that indemnifies against the condition of becoming liable.

(citations omitted). A policy or contract of liability insurance is "an indemnity agreement which protects the insured against his liability to others." *Twin City Fire Insurance Company v. Wilkerson*, 247 F.Supp.766, 767 (E.D. Tenn. 1965) (quoted with

approval in *Aetna*).

On the other hand, a cause of action involving UM/UIM coverage sounds in contract, rather than tort, law. *Miller v. State Farm Mut. Auto. Ins. Co.*, 87 F.3d 822, 825 (6th Cir. 1996) (quoting *Miller v. Progressive Casualty Ins. Co.*, 635 N.E.2d 317 (Ohio 1994)). *See also Rosa v. Allstate Ins. Co.*, 981 F.2d 669, 673 n.7 (2d Cir. 1992)(distinguishing between liability and first-party insurance). Under Ohio law, UM/UIM coverage does not indemnify an insured against loss or liability on account of personal or property injury to others. Rather, the purpose of UM/UIM coverage is to provide protection to an insured who is legally entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle because of injury to the insured herself. O.R.C. § 3937.18.

In this case, defendant has asserted a claim for UM/UIM coverage for injuries sustained in a motor vehicle accident. Defendant does not seek to indemnify herself against liability for injuries suffered by another; she seeks to recover for fatal injuries sustained by Hutchins, who she asserts was a covered insured under plaintiff's policy with Medallion. Thus, defendant asserts claims against plaintiff as an insurer of a UM/UIM policy, not as an insurer of a liability policy.

Second, this case does not involve an action against an insurer. Rather, this case involves an action by an insurer against a claimed insured. The Supreme Court addressed the significance of this distinction in a case involving workers' compensation coverage in *Northbrook*. In that case, the insurer filed suit in a federal district court appealing a workers' compensation award to an employee of its insured by the Texas Industrial Accident Board. 493 U.S. at 7-8. The district court dismissed the case for lack of subject matter jurisdiction based upon the direct action proviso and the fact that the employee and

the insured employer were citizens of the same state. *Id.* at 8-9. The Supreme Court reversed on the grounds that the direct action proviso was inapplicable to a case brought by an insurer. *Id.* at 9. In the words of the Court,

> The language of the proviso could not be more clear. It applies only to actions *against* insurers; it does not mention actions *by* insurers.

Id. at 9. The Court reviewed the legislative history of the proviso and noted that Congress failed to "express any concern about diversity actions filed *by* insurance carriers." *Id.* at 10. Acknowledging the "somewhat anomalous" result of retaining diversity over actions initiated by out-of-state insurers while at the same time prohibiting their removal if initiated by an insured, the Court nonetheless held that this "seemingly incongruity" was insufficient to justify an extension of "the scope of Congress' precise wording in § 1332(c)." *Id.* at 12. Despite the fact that the proviso's purposes might be better served by a different result, the Court refused

> to attribute to Congress an intent broader than that specifically expressed in the direct action proviso. Congress could easily have used language to bar suits *by* insurers, and it can easily do so still.

Id. at 12-13.

The Sixth Circuit reached the same conclusion in *Aetna*,[12] finding that neither the proviso's legislative history nor

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[12] In *Aetna*, the insurer brought a declaratory judgment action against an employee of its insured for the purpose of settling

its plain language supported the conclusion that it was intended to apply to an action in which an insurer is the moving party. 606 F.2d at 127. The court explained the difference between such a case and one in which the injured party initiates the action:

> If, pursuant to § 1332(c), a liability insurer is denied access to the federal courts, the insurer is thereby forced to commence its action in a foreign jurisdiction, namely the local jurisdiction of the injured party. In this forum, the out-of-state insurer may, at the least in theory, be subject to a local prejudice in favor of the injured resident. Because of this possibility of prejudice, direct actions brought by liability insurers, unlike direct actions brought by injured parties, lie squarely within "the spirit and the intent...of the diversity jurisdiction of the Federal judicial system."

Id. (citation omitted). *See also Dairyland Ins. Co. v. Makover*, 654 F.2d 1120, 1125 (5th Cir. 1981) ("Section 1332(c) is not applicable to this declaratory judgment action in which a liability insurer is the plaintiff."); *Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991) (finding fact that insurer instituted action "makes all the difference"); *Evans v. Nationwide Ins. Co.*, 708 F.2d 723 (6th Cir. 1982), *unreported* ("A declaratory judgment action solely to determine coverage is not a direct action against an insurer within the meaning of 29 U.S.C. § 1332.").

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compensation claims arising from alleged work-related injuries. 606 F.2d at 125.

This Court cannot apply the direct action proviso to a case brought by an insurer when explicit statutory language directs that it applies to actions against insurers. *See Aetna*, 606 F.2d at 127. "No court is allowed to supplement a clear statutory provision such as § 1332(c), even when such supplement would produce beneficial results." *Id.* To do so would exceed this Court's power of statutory interpretation and encroach upon the congressional power to legislate. *Id.*

Because this case involves neither a "policy or contract of liability insurance" nor a "direct action against the insurer," this Court finds that the direct action proviso contained in § 1332(c)(1) is inapplicable.

Even if this case involved an action against an insurer of a policy or contract of liability insurance, § 1332(c)(1) would nonetheless be inapplicable. Despite the fact that two adequate bases for this conclusion have been set forth above, this Court feels compelled to address the issue of whether a *Scott-Pontzer* case constitutes a direct action under § 1332(c)(1) and finds that it does not.

The Sixth Circuit has not interpreted the term "direct action" so broadly as to include *Scott-Pontzer* cases. In fact, the entire theory underlying that line of cases, i.e., that the employee is an insured under her employer's UM/UIM policy, is contrary to the concept of a direct action. In a direct action, a claimant is permitted to directly sue the tortfeasor's insurer without joining the tortfeasor himself. In a *Scott-Pontzer* case, a claimant is permitted to directly sue her employer's insurer in order to gain the status of an insured and its attendant UM/UIM coverage.

"The general rule has always been that the direct action proviso does not affect suits brought by an insured against his

own insurer." *Bowers v. Continental Ins. Co.*, 753 F.2d 1574, 1576 (11th Cir.1985). This rule was first articulated by the First Circuit in *White v. U.S. Fidelity & Guaranty Co.*, 356 F.2d 746 (1st Cir. 1966). In *White*, an insured brought a declaratory judgment action against his automobile liability insurance company and his judgment creditor seeking a determination that a policy of insurance was in effect at time of an accident involving the plaintiff and the judgment creditor. *Id.* at 747. After the insurer removed the case to federal court, the plaintiff sought to have it remanded pursuant to § 1332(c)(1). *Id.* The plaintiff argued that the direct action proviso applied since her petition for declaratory judgment was a "direct action" and she, the insured, was not "joined as a party defendant." *Id.* The Court rejected this argument, holding that to do otherwise would ignore the clear legislative purpose as well as "the deliberate use of the adjective 'direct.'" *Id.* at 748. The Court then stated,

> We conclude on this issue by pointing out a logical impasse confronting plaintiff. She seeks to invoke Section 1332(c) to destroy diversity jurisdiction on the ground that this is an action against the insurer where the insured is not joined as a party defendant. But the whole substantive issue raised by her petition for declaratory judgment is whether at the date of the accident she was an insured and Fidelity was her insurer. In short, resolution of the ultimate substantive issue is a prerequisite to the resolution of the preliminary jurisdiction issue. This inverse illogic is another reason why Congress could not have intended the statute to have a broader reach than the purpose it so unequivocally described.

Id. See also McGlinchey v. Hartford Accident & Indemnity Co.,

866 F.2d 651, 653 (3d Cir. 1989) (holding action by insured against insurer on UM/UIM provision not a direct action under § 1332(c)(1)); *Bowers*, 753 F.2d at 1576 (holding action by insured against insurer on no-fault policy not a direct action under § 1332(c)(1)); *Bishop v. Allstate Ins. Co.*, 313 F. Supp. 875, 876 (W.D. Ark. 1970) (holding action by insured against insurer on UM/UIM provision not a direct action under § 1332(c)(1)); *Adams v. State Farm Mut. Automobile Ins. Co.* 313 F. Supp. 1349, 1352 (N.D. Miss. 1970) (same); *Inman v. MFA Mutual Ins. Co.*, 264 F. Supp. 727 (E.D. Ark. 1967) (same); *Carvin v. Standard Accident Ins. Co.*, 253 F. Supp. 232, 234 (E.D. Tenn. 1966) (holding action by insured against insurer on liability policy for the benefit of insured's creditors not a direct action under § 1332(c)(1)).

The Second Circuit agreed in *Rosa*:

> Because the § 1332(c) proviso is designed to address cases in which an insured may be, but is not, joined as a party-defendant, it would be inappropriate for the proviso to affect situations where a person characterizable as an insured party sues the insurer, since a plaintiff obviously cannot join herself as a party-defendant.

981 F.2d at 678 n.18.

The same reasoning applies to the case currently before this Court. Defendant asserts that Hutchins should be found to be an insured under the policy issued by plaintiff to Medallion. Under these circumstances, it is illogical to characterize this action as a direct action. The direct action proviso was passed in response to state direct action statutes authorizing actions against insurers by injured parties to whom the insured was

liable. In such a case, Congress determined that the insurer should stand in the shoes of, i.e., be deemed to have the same citizenship as, the insured. This purpose is not served when the claimed insured brings an action against her own insurer. In such a case, the insured and insurer are at odds; the insurer does not stand in the shoes of the insured. As explained by the court in *Spooner v. Paul Revere Life Ins. Co.*, 578 F.Supp. 369, 373 (E.D. Mich. 1984):

> The application of the proviso to an insurance company in the typical tort action is proper because the tortfeasor has purchased the policy as protection against liability arising from his breach of a duty owed to the injured party. The typical action is such that the act for which liability is sought to be imposed against the insurance company is the same act for which liability could be imposed against the insured. In this sense, the insurance company derives its liability from the insured. With the 1964 amendment, Congress intended that the insurer derive its citizenship from the insured as well.

In contrast, as set forth above, *Scott-Pontzer* cases sound in contract. There is no act for which liability can be imposed on both the insured and the insurer. Instead, the employee seeks to be deemed an insured in order to collect UM/UIM benefits from the insurer for injuries for which another uninsured or underinsured individual is liable. As explained by the Eleventh Circuit in *Fortson v. St. Paul Fire and Marine Insurance Co.*, 751 F.2d 1157, 1159 (11th Cir. 1985), "unless the cause of action against the insurance company is of such a nature that the liability sought to be imposed could be imposed against the insured, the action is not a direct action." *See also Rosa*, 981 F.2d at 675; *McGlinchey*, 866 F.2d at 653; *Tuck v. United*

Service Automobile Assoc., 859 F.2d 842, 847 (10th Cir. 1988); *Beckham v. Safeco Ins. Co. of America*, 691 F.2d 898, 902 (9th Cir. 1982).

Outside the context of the direct action proviso, a direct action is one "in which the insurance company is being sued for its own acts or omissions." *Broyles v. Bayless*, 878 F.2d 1400, 1405 n.1 (11th Cir. 1989). However, as used in § 1332(c)(1), "[t]he phrase 'direct action' is a term of art, and neither the statute nor the cases interpreting it support the view that it includes every action in which an insurance company is a party." *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1188 (5th Cir. 1988). Merely because "an insurer is a 'direct' party does not make the litigation a 'direct action'" under the proviso. *Id.* For example, in *Sours v. American States Ins. Co.*, 986 F.2d 1429, *2 (10th Cir. Feb. 22, 1993), *unreported*, the court held that an action by an injured motorist against the negligent motorist's insurer for negligent defense and bad faith was not a direct action under § 1332(c)(1). Other courts have reached the same conclusion with regard to an action by an insured against his insurer for failure to indemnify and defend, *Searles v. Cincinnati Ins. Co.*, 998 F.2d 728 (9th Cir. 1993); an action by an insured's parents against his insurer for breach of contract, breach of implied covenant of fair dealing and intentional infliction of emotional distress, *Tuck*, 859 F.2d at 847; an action by a widower against a doctor's insurer for failure to resolve his claim in good faith, *Fortson*, 751 F.2d at 1159; an action by an injured motorist against a negligent motorist's insurer for unfair settlement practices, *Beckham*, 691 F.2d at 902; and an action against a life insurer for breach of contract, *Velez v. Crown Life Ins. Co.*, 599 F.2d 471, 473 (1st Cir. 1979).

Contrary to defendant's assertions, the relatively narrow reading of the direct action proviso set forth above is not in conflict with Sixth Circuit precedent. While the Sixth Circuit

has not directly addressed the issue of whether cases involving UM/UIM coverage constitute direct actions, there is nothing to indicate that the court would interpret the direct action so broadly.

In *Henderson v. Selective Insurance Co.*, 369 F.2d 143, 144 (6th Cir. 1966), Charles Hunt was involved in an automobile accident while test-driving a car owned by the Louisville Motor Company. The four injured parties sued Hunt and the dealership in state court. *Id.* Hunt was defended by his insurer Allstate, and the dealership was defended by its insurer Selective. *Id.* A ruling was issued in favor of the dealership and against Hunt. *Id.* Subsequently, the four injured parties, now judgment creditors, brought an action against Selective and Fireman's Fund, the car salesman's insurer, in federal court. *Id.* at 144-145. On appeal, Selective moved to have the case remanded to state court based upon § 1332(c)(1) and lack of diversity between the judgment creditors and the dealership and salesman. *Id.* at 149. The Sixth Circuit denied the motion, stating that the direct action proviso "was not designed to reach the situation with which we are confronted here." *Id.* (citing *White*, 356 F.2d 746).

In *Ford Motor Co. v. Insurance Co. of North America*, 669 F.2d 421, 422 (6th Cir. 1982), the Sixth Circuit held that the direct action proviso destroyed diversity where a injured party sues the tortfeasor's insurer under Michigan's "no-fault" statute and the plaintiff and the insured, though not a party, are citizens of the same state. The court concluded that

> no-fault insurance operates in exactly the same way as the Louisiana and Wisconsin direct action statutes– it permits a person claiming injury or damage arising from the ownership or use of a motor vehicle to sue the insurer rather

> than the owner or operator of the vehicle. Unless the proviso is held to apply, the same "back door diversity" which Congress eliminated by the 1964 amendment would be possible under no-fault. No-fault represents a latter-day attempt by the states to improve the mechanism for recovery by those injured and damaged in accidents arising out of the use of motor vehicles. Given Congress' reaction to earlier state legislation which permitted direct actions, no-fault should not be held to expand the jurisdiction of federal courts. Where, by making the insurer the defendant a plaintiff creates an apparent diversity which would not exist if the owner or operator of an insured vehicle were a named defendant, § 1332(c) operates to deny jurisdiction by attributing the citizenship of the insured to the insurer.

Id. at 425-426.[13]

As discussed above, a UM/UIM policy does not operate

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[13] Other circuits have determined that the direct action proviso does not apply to no-fault insurance claims. *See Rosa*, 981 F.2d at 678-679; *McGlinchey*, 866 F.2d at 652-653; *Bowers*, 753 F.2d at 1576. In addition, *Ford Motor Co.* was criticized by the court in *Spooner v. Paul Revere Life Insurance Co.*, 578 F.Supp. 369, 372 (E.D. Mich. 1984), for misreading the cases upon which it relied. The court in *Spooner* stated that it was "not bound to follow" *Ford Motor Co.* and concluded that the direct action proviso was not applicable to an action involving no-fault insurance. *Id.* at 372-374. In any case, however, *Ford Motor Co.* does not require this Court to find that the direct action proviso applies to UM/UIM coverage.

in exactly the same way as a liability policy. In addition, in a *Scott-Pontzer* case, the claimed insured asserts claims against her own insurer. In *Ford Motor Co.*, the injured party asserted claims against the tortfeasor's insurer. Thus, the purpose of the direct action proviso and the rationale behind the court's decision in *Ford Motor Co.* are not applicable to this case. As the Sixth Circuit stated in *Stockton v. General Accident Insurance Co.*, 897 F.2d 530 *3 (6th Cir. March 6, 1990), *unreported*,

> The general understanding in this circuit has been that the term "direct action," as used in the proviso, means an action that under applicable state law may be brought directly against the insurer by the tort claimant prior to entry of any judgment against the alleged tortfeasor.

(citing *Carvin*, 253 F.Supp. 232 (holding action by insured against insurer on liability policy for the benefit of insured's creditors not a direct action under § 1332(c)(1)); *Cunningham v. State Farm Mut. Auto Ins. Co.*, 297 F.Supp. 1138 (E.D. Tenn 1969) (holding action by injured motorist against tortfeasor's insurer for breach of implied contract to pay extent of insured's liability not a direct action under § 1332(c)(1))).

A direct action under § 1332(c)(1) does not include an action brought by an insurer against a claimed insured for declaratory judgment as to the parties' rights and responsibilities under the UM/UIM provisions contained in a policy issued to the claimed insured's employer. Therefore, this Court finds that the direct action proviso contained in § 1332(c)(1) is

inapplicable.[14]

Abstention

A finding that this Court has the power to exercise subject matter jurisdiction does not end the inquiry in light of defendant's request that this Court abstain from doing so.

There are three types of abstention recognized by the Supreme Court. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813-817 (1976). When a case involves questions of state law, the resolution of which may moot or present in a different posture a federal constitutional question, this Court should abstain pending resolution of the state law questions by a state court. *See, e.g., Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). Similarly, this Court should abstain from exercising federal review over a state law question if doing so would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *See, e.g., Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Finally, this Court should abstain where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, state nuisance proceedings antecedent to a criminal prosecution or the collection of state taxes. *See, e.g., Younger v. Harris*, 401 U.S. 37 (1971); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Great Lakes Dredge & Dock Co. v.*

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[14] This Court is aware of, but respectfully disagrees with, the opinions issued in *Kohus v. Hartford Insurance Co.*, No. 01CV1179 (N.D. Ohio Nov. 19, 2001); *Verhovec v. Wausau Insurance Co.*, No. 01CV662 (N.D. Ohio Nov. 14, 2001); and *Kormanik v. St. Paul Fire and Marine Insurance Co.*, No. 01CV 2122 (N.D. Ohio Oct. 19, 2001).

Huffman, 319 U.S. 293 (1943).

All three abstention doctrines dictate against abstention in this case. This case does not involve federal constitutional issues. Nor are there any concurrently-pending state criminal, nuisance or tax collection proceedings. While this case does involve state law claims, the state law to be applied appears to be settled in that there is an Ohio Supreme Court case which defendant argues is directly on point. *See Scott-Pontzer*, 710 N.E.2d 1116.

As explained by the Supreme Court,

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.

Colorado River, 424 U.S. at 813 (citations omitted).

Defendant has failed to show that exceptional circumstances exist such that abstention would clearly serve an interest more compelling than this Court's duty to exercise its jurisdiction. Therefore, this Court declines to abstain in this matter.

Certification of Questions to Ohio Supreme Court

Plaintiff correctly points out that defendant has failed to articulate any questions that require certification. Instead, defendant merely "requests this Court certify any question of State law regarding insurance coverage and the interpretation of O.R.C. 3937.18 to the Ohio Supreme Court per Ohio S.Ct. Practice R. 18." Defendant claims that certification is warranted in the interest of judicial economy and preservation of judicial resources.

Rule 18 § 1 of the Rules of Practice of the Supreme Court of Ohio states,

> The Supreme Court may answer a question of law certified to it by a court of the United States. This rule may be invoked when the certifying court, in a proceeding before it, determines there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court, and issues a certification order.

Defendant has failed to articulate a specific question of Ohio law that may be determinative of the issues in this case for which there is no controlling precedent in the decisions of the Ohio Supreme Court. To the contrary, defendant's arguments in this case are based on *Scott-Pontzer*, a recently-decided and arguably controlling opinion issued by that court.

Therefore, this Court finds that certification to the Ohio Supreme court is not required.

CONCLUSION

For these reasons, Defendant's Motion to Remove Case to State Court, or in the Alternative, to Certify Any State Law Questions to the Ohio Supreme Court is denied.

IT IS SO ORDERED.

s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

APPENDIX N

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:00 CV 1864

Margaret F. Martin, et al.,

Plaintiff(s),

v.

Liberty Mutual Insurance Co., et al.,

Defendant(s)/Third-Party Plaintiffs.

JUDGE: DOWD

ORDER

On November 16, 2001, the Court issued an order in which the Court questioned its subject matter jurisdiction in light of the Opinion and Order issued by the Honorable Dan A. Polster in *Kormanik v. St. Paul Fire and Marine Ins. Co.*, Case No. 5:01CV 2122. Accordingly, the Court vacated the trial date of November 26, 2001 and permitted the parties to brief the issue of jurisdiction.

The Court has received Plaintiffs' brief regarding jurisdiction, and Defendant's brief is forthcoming, as the Court gave the parties until December 3, 2001 in which to file their briefs. In the interim, however, the Court has continued to study this issue, and the Court is now of the opinion that it does have

jurisdiction. Accordingly, the Court conducted a status conference with counsel for the parties on November 26, 2001 to discuss rescheduling this matter for trial.

Trial with respect to Plaintiffs' case-in-chief is scheduled for Friday, November 30, 2001 beginning at 9:00 a.m. Upon conclusion of Plaintiffs' case-in-chief, the Court will stand in recess until Wednesday, December 12, 2001 at 1:00 p.m., at which time Defendants will present their case-in-chief.

Despite the fact that the Court has rescheduled this matter for trial, Defendants shall still have until December 3, 2001 in which to address the issue of jurisdiction. In the event Defendants are successful in convincing the Court that it does not have jurisdiction, the Court will not go forward on December 12, 2001.

IT IS SO ORDERED.

November 27, 2001
Date

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

APPENDIX O

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01 CV 2046

GLENN E. BLISS, JR. *Personally, and as the Administrator of the Estate of* BRENDA K. BLISS

Plaintiff

-vs-

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

Defendant

JUDGE: LESLEY WELLS

ORDER

On 11 September 2001, this Court ordered Defendant National Union Fire Insurance Company of Pittsburgh ("National Union") to show cause on or before 11 October 2001 why this case should not be remanded to the Court of Common Pleas for Cuyahoga County, Ohio for lack of subject matter jurisdiction. (Docket No. 7). On 11 October 2001, National Union filed a memorandum of law in response to the order, in which National Union argues that complete diversity of citizenship exists. (Docket No. 9).

The Court is satisfied that cause has been shown why this case should not be remanded. Accordingly, the case will proceed.

IT IS SO ORDERED.

/s/ Lesley Wells
UNITED STATES DISTRICT JUDGE